Supreme Court, U.S.
FILED
98 892 NOV 25 1998
OFFICE OF THE CLERK

No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

LEON J. SAVOIE; SAVOIE WEALTHBUILDER ACCOUNT, EARL HOVEY; HOVEY WEALTHBUILDER ACCOUNT; RONALD G. FERRIS; RONALD G. FERRIS WEALTHBUILDER ACCOUNT; DONNA L. FERRIS; DONNA L. FERRIS WEALTHBUILDER ACCOUNT; HERMAN H. HOLMES; LUCILLE HOLMES; HOLMES WEALTHBUILDER ACCOUNT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

RICHARD J. RODNEY, JR.,et al.,

&

PIPER FUNDS, INC. INSTITUTIONAL GOVERNMENT INCOME PORTFOLIO; PIPER CAPITAL MANAGEMENT, INCORPORATED; PIPER JAFFRAY, INC.; PIPER JAFFRAY COMPANIES, INC.; WILLIAM H. ELLIS; EDWARD J. KOHLER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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94 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, PURSUANT TO THE COMMON FUND/BENEFIT DOCTRINES, OBJECTORS WHO PRESERVE A COMMON FUND FOR THE BENEFIT OF OVER 400 CLASS MEMBERS, HELD TO BE SUCH ONLY AS A RESULT OF OBJECTORS' EFFORTS, MAY BE DENIED FEES AND WHETHER THOSE CLASS MEMBERS MUST PAY FEES TO CLASS COUNSEL, WHO NOT ONLY REFUSED TO REPRESENT THEIR INTERESTS BUT SOUGHT TO EXTINGUISH THEIR CLAIMS TO THE SETTLEMENT FUND?

II. WHETHER DUE PROCESS IS VIOLATED WHEN:

A. CLASS MEMBERS ARE FOUND TO BE BOUND BY A SETTLEMENT WHEREIN FED.R.CIV.P. 23(C)(2) NOTICE WAS PROVIDED TO AN INTERMEDIARY WHICH THE COURT FOUND TO BE ACTING CONTRARY TO THE INTERESTS OF THE CLASS MEMBERS AND THE INTERMEDIARY MADE THE FED.R.CIV.P. 23(B)(3) DECISION NOT TO OPT OUT; AND

B. THE COURT DENIES INTERVENTION AS OF RIGHT TO CERTAIN CLASS MEMBERS AND OTHER NONCLASS MEMBERS DESPITE FINDING THAT THE PROPOSED INTERVENORS' INTERESTS ARE NOT ADEQUATELY REPRESENTED IN THE LITIGATION AND THAT THE JUDGMENT WILL BIND THEM?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is set forth in the appendix as Exhibit A, p.1a. The Order denying rehearing before the Eighth Circuit is Exhibit B, p. 4a. The Judgment of the United States District Court for the District of Minnesota is Exhibit D, p.38a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S. C. Sec. 1254(1). The United States Court of Appeals for the Eighth Circuit issued its Opinion in this case on July 24, 1998. Rehearing, timely requested, was denied on August 27, 1998. This petition was timely filed within 90 days of the denial of rehearing.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

1. The due process clause of the Fifth Amendment, U.S. Constitution provides:

No person shall be . . . deprived of life, liberty or property, without due process of law . . .

2. Federal Rule of Civil Procedure 23 provides in relevant part:

(c)(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any

member who does not request exclusion may, if the member desires, enter an appearance through counsel.

3. Federal Rule of Civil Procedure 24(a)(2) provides:

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

The underlying action was brought on behalf of all persons or entities who purchased shares of the Piper Funds, Inc. Institutional Government Income Portfolio (the "Fund") during the period July 1, 1991 through May 9, 1994 (the "Class"). The District Court had jurisdiction over the underlying case pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, and 28 U.S.C. §1331. The Amended Complaint alleged that defendants, including Piper Jaffray Companies, Inc. ("Piper"), violated federal and state securities laws by perpetrating a fraud on the market by misrepresenting the nature of the Fund to investors. Approximately 400 members of that Class were trust accounts which purchased some $40 million of the Fund through their trustee, Merchants Trust Company ("MTC"), a wholly owned subsidiary of Merchants Bancshares, Inc., a publicly traded holding corporation (collectively "Merchants"). Collectively, those purchasing through MTC were the largest single group of purchasers in the Class. *See* Eighth Circuit Appendix, pp. 181 - 230 at 182 (hereinafter "App. ___").

To properly understand the occurrences below, it is first necessary to review the occurrences in another piece of litigation maintained on behalf of the Petitioners in the case *sub judice*. On

October 25, 1994, the Savoies, who were the settlors and beneficiaries of one of the trust accounts at MTC, filed a class action Complaint in the U.S. District Court in Vermont against Merchants on behalf of all persons *or entities* (including trusts) who purchased shares of the Fund through Merchants during the period January 1, 1993 through June 30, 1994 (the "Vermont Class"). The *Savoie* Complaint alleged, *inter alia*, that *Merchants*, in various mailings to its clients and separate and apart from anything Piper may have done, issued *its own* false and misleading statements about the safety of the Fund. App. 181-230. Thus, Merchants' trust clients, who were misled directly by Merchants and defrauded by Piper due to its fraud on the market, were members of both the Class in this case and the Vermont Class.

On November 30, 1994, Merchants, under a barrage of negative publicity prompted by the *Savoie* suit, announced that it would pay its clients a portion of their losses in the Fund ($9.2 million). The payment did not make the trusts whole, restoring only a portion of the Vermont Class' losses.[1] Defendants told the Vermont Court that "we must emphasize that payments by Merchants Trust have not been offered in settlement of this case or any other. No releases are requested, and no dismissal is sought." App. 341. Merchants repeatedly told the Vermont District Court and the press that the payment was made solely "to restore trust" in Merchants. App. 318, 338. In late December 1994, Merchants made its payment directly to members of the Vermont Class. Critically, Merchants neither requested nor received any releases from the Vermont class or assignments of claims from the Vermont class of any kind.

In February 1995, two months after Merchants' payment, the case below was preliminarily resolved for $70 million. Shortly

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[1] Initially, Merchants announced that, even after the payment, its trusts would still have an out-of-pocket loss of 3% on their $40 million investment (or about $1.2 million). App. 338-39. Subsequently, the amount of the trusts' continuing loss has been revealed to be between $2.8 million, App. 487-88. Thus, while the Savoies lost $24,000 on their investment, they received $17,318 from Merchants.

before the hearing on preliminary approval for the settlement, counsel for the class below ("Class Counsel") confirmed to Petitioners' counsel that Merchants intended to keep the settlement proceeds relating to the shares purchased by Merchants' trust accounts. Petitioners' counsel explained to Class Counsel that the shares purchased by Merchants were purchased in its capacity as trustee on behalf of its trusts; that because Merchants did not obtain any assignment of claims from such trusts or their beneficiaries when it made its payment, it had no legal entitlement to such proceeds; and that Merchants had no arguable equitable claim, let alone a demonstrated one, to the proceeds in light of the fact that the trusts and/or their beneficiaries continued to suffer a material out-of-pocket loss on their investment in the Fund. Nonetheless, Class Counsel refused to consent to a stipulated order requiring the disputed settlement monies to remain escrowed pending the legal resolution of the ownership of such proceeds. App. 44-45.

On July 27, 1995, Mr. Savoie, on his own behalf and on behalf of *all* persons or entities (including trust accounts) who purchased Piper shares through Merchants, App. 46, objected to preliminary approval of the settlement insofar as it would facilitate Merchants' illegal plan to keep its trusts' monies. App. 46-51. In seeking preliminary approval for the settlement, neither Class Counsel nor defendants had brought this dispute to the Court's attention. Objectors made the Court aware of Merchants' intent to keep its trusts' settlement proceeds and of the denial of due process which was about to befall 400 class members. As explained to the Court, since Merchants was acting contrary to the interests of its trust clients, it was unlikely to provide its clients with the Court ordered Notice, thereby effectively depriving the trusts and the trusts' owners of the option of opting out or objecting to the settlement. App. 46-51; 92-102; 111-114.

After hearing Petitioners' Objections, the District Court deferred consideration of the issues surrounding the Vermont Class' settlement proceeds and granted preliminary approval of the settlement.

On November 24, 1995, Objectors, "individually and on behalf of all persons or entities [including trust accounts] who purchased approximately $40 million of shares of [the Fund] through [Merchants]," objected, in part, to final approval of the Settlement and plaintiffs' Motion for Fees.[2] App. 157-365. Objectors then brought to the Court's attention the *actual* denial of due process inflicted on the trusts and their owners who purchased through Merchants. Thus, although the Order granting preliminary approval specifically ordered Class Counsel to mail the Notice, or cause it to be mailed, to all members of the settlement class "who could be identified through reasonable effort," App. 129, and those purchasing through Merchants could have easily been ascertained, the Court ordered Notice was *not* sent to them.

Instead, Class Counsel caused the Court ordered Notice to be sent only to Merchants which, having decided to intercept and keep its clients' settlement proceeds and acting solely in its own interests (as opposed to those of its trust accounts as clients), thereafter allowed the opt out deadline to pass. As to the beneficial owners of the shares (who were the only ones capable of speaking on behalf of their trusts, given the trustee's abdication of its role as such), the only "Notice" they received was a deceptive letter sent by Merchants on September 7, 1995 which: 1) proclaimed that the settlement proceeds belonged to Merchants as reimbursement for its $9.2 million payment; 2) did not inform its clients that they or their trusts were included in the class; 3) failed to inform its clients that they or their trusts had the right to object to Merchants' efforts to take their portion of the settlement proceeds or, for that matter, any other aspect of the settlement: and 4) failed to disclose the ongoing dispute regarding the ownership of the settlement proceeds. App. 356. The Objectors again urged the Court to require the disputed settlement proceeds to remain escrowed.

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[2]So as not to delay other class members' access to their settlement proceeds, the Objectors only objected to the Settlement insofar as Merchants would be handed the Vermont Class' settlement proceeds. Moreover, the Objectors only contested attorneys' fees insofar as fees relating to the Vermont Class' settlement proceeds were being paid to Class Counsel. Objectors did not contest Class Counsel's entitlement to the other $10+ million in fees in light of their contribution to the creation of the settlement fund.

Objectors also objected to Class Counsel's receipt of all of the fees attributable to the shares purchased by the Vermont Class, given Class Counsel's repeated failure to protect the Vermont Class' interests and the extensive efforts undertaken by Objectors' counsel to remedy Class Counsel's dereliction of duty.

In response to these objections, Merchants, as part of its scheme to abscond with its trusts' settlement proceeds, filed papers misrepresenting to the Court that "the [Objectors] were never the record or beneficial owners of the Piper Jaffray shares." App. 367. Given the trust relationship between Merchants and its clients and numerous prior communications from Merchants to its clients referencing the fact that the investment was made on its clients' behaves, Merchants' representation was openly false. Merchants also informed the Court that "Merchants Trust Company did not act as a broker for the [Objectors], nor did it ever place or earmark Piper Jaffray shares for their account." Id. This representation was also openly false. Thus, at the December 8, 1995 hearing on final approval, and as Exhibit A to their December 30, 1995 Motion for Reconsideration, the Objectors presented the Court with copies of their account statements showing their direct purchases and losses on their shares in the Fund purchased through Merchants.

In support of Merchants' position, Class Counsel opposed the Objection, arguing that Objectors had no standing, were not entitled to notice and were not entitled to the settlement proceeds because they were not members of the settlement class. Dkt. 209. lass Counsel, while fully cognizant of Merchants' plan to keep the disputed settlement proceeds, advocated distributing the money to Merchants.

Accepting Merchants' and Class Counsel's positions at face value, the Court, on December 14, 1995, entered the Final Judgment prepared by Class Counsel (which failed to address the Merchants controversy in any fashion) and an Order denying the Objectors' Objections and finding that the Objectors had no standing. The Court found that Merchants was not just the legal title holder, but also the "beneficial owner" of the shares purchased, and that it therefore held all interests in the shares. The Court also denied the Objectors' Objection as to Attorneys' Fees, App. 469.

Recognizing that the December 14, 1995 Order not only precluded the trusts or their owners from obtaining their settlement proceeds in this action but would also bar them, through principles of *res judicata* and/or collateral estoppel, from subsequently filing suit to obtain those proceeds from Merchants, Objectors moved for Reconsideration of the Order. App. 470-503. Defendant Piper then filed a "Response" to Objectors' Motion, in which it agreed with Objectors that the Court's prior ruling was in error. Dkt. 228. Nonetheless, Class Counsel, the following day, filed another brief continuing to urge the Court *not* to escrow the monies and, instead, to distribute the funds to Merchants and to fashion an Order designed to allow Merchants to keep its trusts' settlement proceeds by finding that the Objectors lacked standing, lacked an injury or had failed to timely intervene. Dkt. 229.

In response to Objectors motion for reconsideration, on January 11, 1996, the Court vacated its previously entered Final Judgment, vacated its December 14, 1995 Order, severed the Merchants controversy from the rest of the case, ordered the settlement proceeds attributable to the Merchants controversy and the *pro rata* attorneys' fees attributable to those settlement proceeds to remain in escrow, and reentered final judgment as to all other settlement class members. App. 534.

On February 7, 1996, Objectors filed a Motion to Intervene in the underlying action in order to protect the Vermont Class' interests against the efforts of Merchants to intercept and keep their settlement proceeds and to protect Objectors' entitlement to attorneys' fees pursuant to the common benefit doctrine. Dkt. 236. On February 9, 1996, Class Counsel again urged the Court to deny the Objectors' Objection because they were not class members and not to escrow the attorneys' fees attributable to that portion of the settlement fund relating to the shares purchased through Merchants. Dkt. 239.

Following further briefing on jurisdiction and venue , on June 24, 1996, the Court entered a "Preliminary Order," setting forth its intent to enter the Final Judgment annexed thereto. Exhibit C, p.5a. Ultimately, with the inclusion of several changes advocat-

ed by the Objectors, the proposed Final Judgment became the February 2, 1997 Final Judgment. p.38a. In contrast to its December 14, 1995 Order, which would have expunged the legal rights of the trust accounts, the Court, as a result of Objectors' litigation efforts, now found that the ***trust accounts*** (*which were Objectors along with the beneficial owners of those accounts*) were the settlement class members, thereby ensuring that the Objectors would thereafter be able to assert legal claims to their entitlement to the settlement proceeds as against Merchants. pp.15a,43a. *See also* Final Judgement, p.57a

The Court's June 24, 1996 Order also held, consistent with the Objectors' request, that the trusts, through their beneficiaries, were to directly receive a Notice explaining the controversy regarding the settlement funds and the Court's intent to enter the Final Judgment and that such beneficiaries would be given the opportunity to object to the proposed Final Judgment. p.7a. *See also* Final Judgement. p51a.

The Court, however, continued in its failure to provide the trusts the opportunity to opt out. In its February 2, 1997 Final Judgment, the Court found that the Release filed by Merchants (App. 456-61), in which its President misrepresented, under oath, that no one other than Merchants (including any "beneficiaries and other transferees") ever held any interest in the shares purchased by its trust accounts, was "invalid", p.52a, and that Merchants, the trustee, had acted, during the litigation, contrary to the interests of its trust accounts. p. 50a. Nevertheless, the District Court held that notice served on the trustee was adequate to bind the trusts, p.50a, and that the invalid release served to bar the trusts and their beneficiaries, who the Court found were *not* included in the Class, from pursuing any further claims against the defendants below. pp.50a, 59a.

The Court's Final Judgment also included a number of holdings designed to preclude Merchants from intercepting and keeping the disputed proceeds without properly obtaining a Court Order holding that it owned such proceeds. Thus, the Court held "presumptively, whatever money is recovered by Merchants...is

held subject to the Trust since Merchants may participate in the settlement solely as trustee" p.46a; that "without authorization from the trust or a court, Merchants cannot keep the Trusts' settlement proceeds for itself..." p.52a, that "only if Merchants' clients have an opportunity to be heard and an appropriate court rules that their rights to the settlement proceeds have been extinguished by Merchants' $9.2 million pay-out can Merchants submit a valid Claim and Release Form that designates itself as payee" pp.52a-53a; and "until further order by an appropriate court, the settlement proceeds belong to the trust." p.53a. Finally, the Court gave the trusts and their beneficiaries sixty days from the time the Final Judgment became final to convince a Vermont Court to accept a transfer of the escrowed monies. Id.

Although these new holdings were a dramatic departure from the Final Judgment advocated by Class Counsel and the Court's December 14, 1995 Order, which would have foreclosed the trust and/or their beneficiaries from obtaining the disputed settlement proceeds in the action below or any subsequent action, and it is undisputed that such changes to the settlement process were implemented only as a result of Objectors' counsels' litigation efforts spanning some two years, the Court denied Objectors' counsel *any* attorneys' fees for their efforts. Instead, the Court ordered all $700,000+ in fees attributable to the trusts' settlement proceeds to be paid to Class Counsel, even though Class Counsel had repeatedly advocated Merchants' position in the litigation, which, the Court found, was contrary to the interests of the trusts, and Class Counsel had already received over $10 million for their efforts in creating the common fund. The Court denied Objectors' counsel fees because they supposedly only appeared on behalf of the trust settlors beneficiaries (a finding directly contrary to Objectors' papers) and, since the Court found that the settlors and beneficiaries were not included in the Class (even though the Class definition expressly included such beneficiaries), supposedly therefore conferred no benefit on any class member. pp.54a-55a.

Although the Court found that the Objectors were not adequately represented by the existing parties, p.50a, it denied intervention based on the same inaccurate conclusion that the Objectors did not include those found to be the class members, the trusts, and

because it inaccurately concluded that "the Savoies' ability to protect any interest they may have in the Merchants Account Share will not be impeded by the Court's intended disposition of the Merchants' controversy." Id.

Even after the Court's protections designed to attempt to prevent Merchants from intercepting and keeping the disputed settlement proceeds were disclosed in its June 1996 Order, Merchants continued to inform the Vermont District Courts and Second and Eighth Circuit Courts of Appeals that it still viewed the monies as its own. Nonetheless, the District Court, in its Final Judgment, refused to address Objectors' position that the Court, when it becomes aware that an intermediary is acting contrary to the interests of the class members, has a fiduciary duty to ensure that class members directly receive their settlement proceeds. Given the Court's finding that it was the trusts, and not the trustee, who owned the settlement proceeds; centuries of black letter trust law holding that the trustee holds merely legal title to trust property, not beneficial ownership; and well established law holding that the proceeds of litigation brought on behalf of a trust belongs to the trust, not the trustee, the Court's decision to hand the trustee the settlement proceeds was in error. While the Court could have easily ensured that the class members received their settlement proceeds, it left the door ajar for Merchants to intercept and keep those proceeds by permitting a physical transfer of the money to Merchants. By doing so, the Court exposed the class to the risk of having to shoulder a previously unprecedented burden to initiate and successfully litigate another action designed to wrest their settlement proceeds from the intermediary's grasp.

The Petitioners timely appealed the District Court's judgment on March 18, 1997. On July 24, 1998, in a *per curium* opinion, a panel of the Court of Appeals for the Eighth Circuit summarily affirmed the District Court's rulings. On August 27, 1998, Petitioners' request for a rehearing was denied.

ARGUMENT

The decisions below create a conflict among the circuits on the question of the application of this Court's common fund/ benefit doctrine in the context of benefits created by objectors to a settlement. This Court has repeatedly held that, as a prerequisite to the application of the common fund doctrine, the fund must inure to the benefit of an ascertainable group of people. *See, e.g., Boeing v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The lower court, in violation of this Court's edicts, required the Petitioners (including the trusts, ultimately held to be the appropriate settlement class members only as a result of the Objectors' litigation efforts) to pay Class Counsel over $700,000 in fees, even though Class Counsel not only refused to protect their interests in this case, but actively advocated legal positions which would deny them their settlement proceeds and sought to bind those class members to the settlement by effectively denying them notice or an opportunity to opt out of the settlement.

On the other hand, the common benefit doctrine dictates that an award of fees is to be made when a litigant or lawyer confers a benefit on others so long as fees may be apportioned on a *pro rata* basis. Id. In contravention of this legal dictate, Objectors' counsel were denied any fees even though they: a) caused the Court to vacate its December 1994 Order holding that Merchants was not just the title holder but also the beneficial owner of the shares it purchased on behalf of Objectors, a finding which would have forever precluded the trusts from obtaining any of the settlement proceeds, b) caused the Court, instead, to enter a Final Judgment holding the "trusts" (which were among the Objectors) were the settlement class members and further holding that unless a Court enters an "appropriate order" finding that the trustee is entitled to the proceeds, the disputed settlement proceeds belong to those trusts; (c) caused the Court to order that the trusts, through their beneficiaries, receive Notice explaining the settlement, the Proposed Final Judgment and the dispute regarding the ownership of the settlement proceeds; and (d) caused the Court to provide the protections recognized as adequate by the District Court and the Eighth Circuit to prevent the Objectors' purported trustee from illegally absconding with the trusts' settlement proceeds. In each instance, these bene-

fits were conferred over Class Counsel's opposition. The fees in escrow were ordered to be set aside on a *pro rata* basis to the settlement funds attributable to those who purchased through Merchants. p.39a.

As the Objectors' efforts have resulted in substantial benefits and protections to the 400 trusts, their attorneys are entitled to compensation for their efforts. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970)(litigators who confer a common benefit of informed decision making entitled to an award of attorneys fees);*Gottlieb v. Barry*, 43 F.3d 474, 491 (10th Cir. 1994)(objectors who made competent and cogent arguments against approved settlement entitled to fees); *Duban v. Diversified Mortgage Investors*, 87 F.R.D. 33 (S.D.N.Y. 1980)(objector who protected interests of trusts and caused additional notice to be sent to affected members of the class entitled to award of fees); *Frankenstein v. McCrory*, 425 F. Supp. 762 (S.D.N.Y. 1977)(objectors entitled to fees even where objections overruled if such objections produced a beneficial effect on the litigation).

The decisions below also create a conflict among the Circuits regarding the requirements of due process with respect to absent class members in the settlement of a class action under Fed.R.Civ.P. 23(b)(3). If the Eighth Circuit's decision is left to stand, the due process rights of members of 23(b)(3) classes will be seriously compromised anytime an intermediary, such as a bank, brokerage firm, trustee or other nominee, has decided to act in its own interest, laying a unilateral claim to the class members' proceeds. In this instance, the Court was fully aware of Merchants' intent to act contrary to the class members' interests.

Due process requires that Rule 23(b)(3) class members receive Notice of a class action settlement and receive the right to opt out of that settlement to preserve their individual claims. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). When an intermediary is acting contrary to the interests of such class members so as to intercept and keep the class members' settlement proceeds, providing Notice of the settlement to the intermediary and allowing the inter-

mediary to decide whether to opt out or accept the settlement is the equivalent of *denying* the class members Notice and the opportunity to opt out. When the Court becomes aware that an intermediary seeks to intercept and keep their settlement proceeds or to deny class members their due process rights, it has a fiduciary obligation to ensure that class members receive their settlement proceeds directly and that due process is fulfilled by directly providing them the required Notice and permitting the opt out decision to be made by those acting on behalf of, not contrary to, the class members' interests.

Finally, the lower courts have created a conflict among the circuits on the issue of intervention as of right under Fed.R.Civ.P. 24. Contrary to all other circuits and the text of the Rule, the opinions below allow a district court to deny intervention as of right even where a proposed intervenor claims interests which are actually impaired by the litigation and the court finds that no party to the litigation is providing adequate representation.

I. THE LOWER COURTS' ORDERS ARE CONTRARY TO THE COMMON FUND/BENEFIT DOCTRINES.

A. The Common Fund Doctrine Is Inapplicable When Class Counsel, Who Created the Fund, Fail to Protect That Fund For The Benefit Of the Class Members And Advocate Positions Which Would Deny The Class Members Such Proceeds.

This Court has consistently recognized "that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 110 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). The common fund doctrine is premised "on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Van Gemert, supra*, 444 U.S. at 478 (citations omitted).

To prevent this inequity, the Court must spread "fees proportionately among those who benefitted by the suit." Id. (citations omitted).

Pursuant to the common fund doctrine, it is not enough that a fund is created as a result of Counsel's efforts. As this Court's prior holdings dictate, that fund must inure to the benefit of the group legally entitled to the fund. Otherwise, there is no potential unjust enrichment and no obligation to pay fees. In the litigation below, Class Counsel in supporting Merchants' claim to the disputed proceeds, sought to extinguish the Class members' claims to the disputed settlement proceeds. If class counsel had prevailed in their legal arguments, these settlement proceeds would have forever been beyond the reach of the 400 trusts. Since the Court ultimately determined the monies belonged to the trusts, rather than Merchants, Class Counsel conferred no benefit on those they sought to represent or those entitled to the fund. Whatever Class Counsel's claims may be against Merchants for payment of fees, the courts below inappropriately forced the 400 trusts to pay $700,000 of attorneys fees to Class Counsel, who, so as to consummate the settlement and facilitate their $10+ million fee request, completely abandoned the interests of those 400 class members.

On numerous occasions, Class Counsel actively asserted positions undermining the trusts' inclusion in the settlement class and their right to receive their settlement proceeds. Thus, while fully aware that Merchants intended to keep the settlement proceeds attributable to the shares purchased by the trusts, Class Counsel submitted papers to the Court asking for preliminary approval of the settlement without even mentioning this controversy and then refused to escrow the disputed settlement proceeds. At the hearing on preliminary approval, Class Counsel argued *against* the trusts' entitlement to their settlement proceeds and argued that the money should be paid to Merchants. App. 92, 115. As a result, in part, of Class Counsel's strenuous advocacy that Merchants was the class member, the Court entered its December 14, 1995 Order finding that Merchants held all interests in the shares, the effect of which would have been to deny the trusts any claim to their settlement proceeds in this or any subsequent litigation.

Vividly documenting the error the lower courts made by requiring the 400 trusts to pay over $700,000 in fees to Class Counsel, at oral argument before the Eighth Circuit, Class Counsel not only proclaimed their allegiance to Merchants, the trustee, but *advocated that the Court find that Merchants' payment fully restored the loss to the trust accounts and that the settlement proceeds belonged to Merchants*!

The Eighth Circuit's Opinion incorrectly recites that the District Court found Merchants to be a Class member. The District Court actually held that the Class members *are the trusts* who purchased through Merchants, p.57a, that Merchants was merely the trustee, and that the settlement proceeds belong to the trusts. pp.50a, 52a, 53a. Setting aside this error committed by the Eighth Circuit, even if Merchants, the trustee, was a nominal class member, this cannot justify Class Counsel's efforts to undermine the interests of the 400 trusts, which the District Court unambiguously held were class members. *See In re General Motors Pick-Up Fuel Tank*, 55 F.3d 768, 801 (3rd Cir. 1995) (Class Counsel owe a fiduciary duty to the entire class). The trusts were ordered to pay those who, at best, represented the interests of a nominal class member to the detriment of the trusts and, at worst, actively supported the interests of a non class member trustee, though doing so was designed to eviscerate the trusts' ability to receive their settlement proceeds.

It is important that this Court clarify the application of the common fund/benefit doctrines. The job of class counsel is not over with by virtue of the creation of the fund. It must be made clear that there is a continuing responsibility to protect the interests of the class members. Rewarding those counsel who abandon class members' interests by forcing those class members to make a full payment of fees to them can only serve to encourage similar behavior in future cases. Class Counsel actively advocated, throughout the settlement process, positions which would have effectively expunged the trusts' rights to ever receive their settlement proceeds. In situations wherein class counsel create a fund, but then fail to confer the benefit of that fund on the group, it should be made clear that the common fund/benefit doctrines have no application.

B. The Common Fund/Benefit Doctrines Require that Objectors' Counsel be Paid Fees For the Extensive Efforts Expended To Protect the Settlement Class Members and The Dramatic Changes They Caused in The Settlement

On the other hand, the common benefit doctrine makes clear that the 400 trusts were obligated to pay Objectors' counsel, who steadfastly represented their interests. Faced with the open refusal of Class Counsel to protect these 400 members of the Class, Objectors' counsel, who also represented those trusts in the Vermont litigation, were forced to litigate for years to protect their interests.

The Objectors dramatically reshaped the settlement for the benefit of those 400 class members. First, in contrast to the Final Judgment advanced by Class Counsel (which contained *no* protections for the trusts against their trustee), the Final Judgment ultimately entered as a result of Objectors' extensive litigation efforts contained substantive holdings designed to ensure that Merchants may not keep the trusts' settlement proceeds without being authorized by a Court to do so, not the least of which was the Court's holding that "until further order by an appropriate court, the settlement proceeds belong to the trust." p.53a. While Objectors believe the District Court was obligated to ensure the Class members' receipt of their settlement proceeds by requiring the settlement proceeds to be paid directly to the trusts which still exist and to the beneficiaries or settlors of those trusts which have been terminated since 1994, the existing protections were substantial, were solely the product of Objectors' efforts and were found by the Eighth Circuit to adequately protect the rights of the trusts. If so, Objectors' right to attorneys' fees is apparent.

Additionally, but for the Objectors' efforts, the trusts would be excluded from the Class and the trusts and/or their owners foreclosed from recovering their settlement proceeds from Merchants. The District Court's December 14, 1995 Order held that neither the trusts nor the owners of such trusts had any interest (whether legal or beneficial) in the shares. Pursuant to *res judica-*

ta or collateral estoppel, that Order put the entire $4.5 million in settlement proceeds beyond reach of even the trusts. Only through Objector's counsel's efforts was this deprivation remedied. *See Granville House, Inc. v. Dept. of H.E.W.*, 813 F.2d 881, 883 (8th Cir. 1987) (under common fund theory, a litigant who creates, increases, or *protects* a fund to the benefit of nonparties is entitled to receive attorneys' fees from that fund).

Furthermore, beyond the benefit of bringing the "controversy" to the court's attention, it was only as a result of the Objectors' efforts that the District Court, in June 1996, ordered Notice to be sent to the beneficiaries of the trusts (the only ones capable of speaking on behalf of the trusts given the trustee's open abdication of its responsibilities) explaining the controversy and affording them the right to object, on their and their trusts' behaves, to the Court's proposed plan to deal with the disputed settlement funds, its intent to enter the Final Judgment attached to the Notice, or other matters addressed in the 1996 Order. This Notice also apprised the trust clients of the course of conduct proposed to be engaged in by the supposed "trustee" of their trust. Ultimately, additional members of the class filed objections to the Court's Proposed Order and that Proposed Order was further modified in response to these objections. Facilitating the trusts' and/or their owners' abilities to make informed decisions regarding these matters entitled the Objectors to attorneys fees. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). *See also Amalgamated Clothing v. Wal-Mart Stores*, 54 F.2d 69, 72 (2nd Cir. 1995) (providing notice and information to interested parties constitutes a benefit).

In contrast to the Eighth Circuit, other courts award fees to objectors, even when the only benefit conferred is forcing the Court to look harder at the fairness of the settlement or providing the Court comfort in resolving ambiguities in the settlement. *See Gottlieb v. Barry*, 43 F.2d 474, 491 (10th Cir. 1994) (reversing district court's finding that objectors' arguments did not contribute to maintenance of the common fund and reinstating special master's award of fees based on the fact that objectors made "cogent[ ] and competent[ ]" arguments in opposition to the approved settlement);

Maywalt v. Parker & Parsley Petroleum Co., 864 F.Supp. 1422, 1439 (S.D.N.Y. 1994) (objectors' merely "salutary effect on settlement process" compensable where absence of objector would have lessened the degree of certainty "somewhat"); *Duban v. Diversified Mortgage Investors*, 87 F.R.D. 33 (S.D.N.Y. 1980) (objector who protected interests of trust beneficiaries and caused additional notice to be sent to affected class members entitled to award of fees). The extensive litigation efforts and the benefits conferred by the Objectors' counsel on the class in this case greatly surpass those spoken to in these cases. *See also Fishers v. Proctor & Gamble Manufacturing Co.*, 613 F.2d 527, 547 (5th Cir. 1980) (Objectors to proposed decree in class action entitled to fees because "insofar as [class counsel] fail to [adequately represent] to such an extent that additional counsel must appear, [class counsel] must be viewed as having performed inadequately").

Notwithstanding the benefits conferred on those the Court found to be the class members, the trusts, the lower courts denied Objectors' counsel any attorneys' fees by incorrectly holding that the Objectors were "a class of trust settlors and beneficiaries." Consequently, the Court held Objectors' Counsel conferred no benefit on Class members. App. 728-30. Actually, the Objectors repeatedly appeared not just in their individual capacities but also on behalf of all other persons ***or entities*** who bought through Merchants (the trusts being some of those entities). *See* App. 46, 154, 157 (emphasis added). *See also* Objections by the Hovey, Ferris and Holmes Wealthbuilder accounts, Dkt. 263-64, and the Objections by Savoie and his Wealthbuilder account. Dkt. 261. Indeed, at one point in the Final Judgement the court acknowledged that the Savoies also appeared on behalf of their Wealthbuilder account. p.40a. While Petitioners repeatedly brought the District Court's error to its attention, it refused to address the issue, choosing merely to reiterate that the Objectors were settlors and beneficiaries only. The Eighth Circuit made the same mistake. p.2a.

Even if the lower courts were correct in their conclusion that Objectors only appeared on behalf of the settlors and beneficiaries of the trusts, a finding at odds with the pleadings, Objectors were still entitled to attorneys' fees for the benefits conferred on the trusts. The application of the common benefit doctrine does not

turn on the style of the caption of a pleading or even upon who counsel purports to represent, but rather on the benefit conferred. The benefits conferred on the trusts as a result of the Objectors' efforts, most significantly, the Court's finding that they are the appropriate class members and the settlement proceeds belong to them, entitles Objectors to attorneys' fees pursuant to the common benefit doctrine, irrespective of whether they appeared on the trusts' behaves or on behalf of the trusts' settlors or beneficiaries. *See, e.g., Blau v. Rayette Faberge, Inc.*, 389 F.2d 469, 474 (2d Cir. 1968) (fees awarded even though suit not commenced).

Beyond the severe injustice inflicted on Objectors, the Eighth Circuit's holding will undermine the continued force of this Court's holdings on the common benefit doctrine and serve to discourage legitimate objections to class action settlements.

II. DUE PROCESS WAS VIOLATED AS THE TRUSTS, HELD TO BE CLASS MEMBERS, AND THE BENE FICIARIES, HELD NOT TO BE CLASS MEMBERS EVEN THOUGH INCLUDED IN THE DEFINED CLASS, HAD THEIR CLAIMS BARRED BASED ON THE ACTIONS OF AN INTERMEDIARY ACTING CONTRARY TO THEIR INTERESTS AND BOTH WERE DENIED NOTICE PURSUANT TO FED.R.CIV.P. 23.

A. Due Process Prohibits the Exclusion of Members of the Class While At The Same Time Binding Them By The Compromise of a Class Action Under Fed.R.Civ.P.23(b)(3) And Precludes the Court From Ignoring the Class Definition.

The definition of the settlement class controls who is a member of that class. The District Court specifically approved the following Settlement Class: "[a]ll persons or entities who purchased shares of [the Fund] during the period July 1, 1991 through May 9, 1994...and *all other original or subsequent holders(s) of any interest in any of said shares* (*including* but not limited to

donees, assignees, devisees, *beneficiaries* and other transferees)." App. 128 (emphasis added). The trust beneficiaries fell squarely within that definition.

Notwithstanding, the Court held that the beneficiaries were not class members and were not therefore entitled to notice and the opportunity to opt out on their or their trusts' behaves.[3] It did so even though the Court found that the trustee had been acting in its own interest and contrary to those of the trusts, thereby rendering the beneficiaries the only ones capable of speaking on behalf of the trusts. Moreover, the Court refused to include in the class those, such as the Objectors, who had canceled their trusts with Merchants. Beyond dispute, there was no justification for ordering their settlement proceeds to be paid to Merchants "as trustee," when it was *not* their trustee. Nor did Merchants have any arguable right or ability to decide to accept the settlement on their behaves.

The District Court did not have the power to foreclose legal remedies against the defendants below which have been or may be brought by the trust beneficiaries since the Court excluded them from the settlement class. App. 753. By excluding these people or entities from the settlement class, the Court necessarily divests itself of the ability to foreclose actions which might be brought by them. *In re School Asbestos Litig.*, 56 F.3d 515, 519 (3d Cir. 1995) (only class members can be bound by settlements or judgments in a class action); *National Superspuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981); *Int'l Union of Electric, Elec., Salaried, Mach., and Furniture Workers, AFL-CIO v. Unisys*, 155 F.R.D. 41, 48 (E.D.N.Y. 1994) (vacating approval of bar notice to nonclass member trusts which purported to extinguish trusts' rights in the settlement res).

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[3]The Court did so based on the assertion that so holding would mean there would be a double recovery, one for the trusts and another for the trusts' beneficiaries. The Objectors never sought a double recovery. Instead, they argued that, in light of the trustees' intent to keep the proceeds, the trusts' settlement proceeds should have been ordered paid directly into the trusts which still exist and directly to the beneficiaries or settlors of canceled trusts.

Nor was the Court free to effectively rewrite the settlement agreement to carve out the beneficiaries. *See Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989) ("courts are not permitted to modify settlement agreements or in any manner to rewrite agreements reached by the parties"); *Welsch v. Gardebring*, 667 F.Supp. 1284, 1289-90 (D.Minn. 1987) ("the Court cannot modify the terms of the [settlement] agreement").

While the District Court properly included the trust accounts in the defined settlement class, a position advocated by Objectors,[4] it is equally clear that the beneficial owners of those trusts are *also* included in the settlement class. Owners of the trusts (whether occupying the position of settlor or beneficiary of such trust) that bought shares of the Fund through Merchants, including Objectors, have an "interest" in the proceeds of the shares purchased for their trusts' benefit, with their trusts' proceeds. Indeed, in ordering notice to be sent to the beneficial owners. the court so found. p.8a.

Given the above, it is undeniable that the Petitioners and all others similarly situated were denied the protections of due process. *See Hansbury v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *All American Airways, Inc. v. Elderd*, 209 F.2d 247, 249 (2nd Cir. 1954); Fed.R.Civ.P. 23(c)(2), (e). The Eight Circuit's holding represents a gross departure from the standards of due process enunciated by other circuit courts and this Court.

B. Due Process And Fed.R.Civ.P. 23 were Violated By Giving Notice to An Intermediary Acting Contrary to the Interests of the Class Members And By Releasing The Claims Of The Class Members Pursuant To A Release, Which Did Not Purport To Release The Class Members' Claims, Submitted by That Intermediary.

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[4]The Objectors' papers repeatedly referenced the fact that the shares were purchased by their trust accounts and the Objectors expressly filed their Objections to preliminary and final approval of the settlement not just on their own behalf, but *"on the behalf of all other persons or entities who purchased"* the shares if the Piper Fund through Merchants App. 46, 157 (emphasis added).

Notice to class members advising them of a potential settlement must meet certain due process requirements under Fed.R.Civ.P. 23(c)(2), affording "the best notice practical under the circumstances, *including individual notice to all members who can be identified through reasonable effort.*" Fed.R.Civ.P. 23(c)(2) (emphasis added). *See also Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173 (1974). The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted). The Notice must be given *"in a manner and form that does not systematically leave an identifiable group without notice."* *Mendoza v. Tuscon School District No. 1*, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) (emphasis added).

Here, notice was provided only to the "trustee," even though the Court and Class Counsel were aware that the trustee was acting in its own interests so as to intercept and keep the trusts' settlement proceeds. The only ones capable of deciding, on the trusts' behaves, whether to object to, or opt out of, the settlement were the owners of the trusts. While the Court, as a result of Objectors' efforts, ultimately gave the trusts' owners the ability to object to the settlement, the opt out decision was made by an intermediary found to have been acting contrary to the class' interests. What the intermediary may have been willing to accept as a settlement, so as to further its own agenda, may have been quite different than that which the class members may have viewed as acceptable. When an intermediary is known to be acting contrary to the interests of the class, providing notice to that intermediary is the equivalent of failing to give notice to the class member.

The Court's suggestion that Merchants acted, in the litigation below, as the "trustee" for its trust accounts and that its Release served to release the trusts' claims against Piper is directly at odds with the Release filed by Merchants and with the District Court's own holdings. In its Release, Merchants, in an effort to make away with its clients' settlement proceeds, expressly misrepresented that no one, other than it, ever held any interest in the shares purchased

through it. App. 459. Merchants did *not* check the box on its Release noting that there were others with interests in the shares and warranting that Merchants had received authority to release the claims on behalf of such persons or entities. *Id.* *See* Final Judgment, p. 19 ("To the Court's knowledge, none of Merchants' clients have approved its plans to keep the settlement proceeds, nor has any court determined that Merchants may keep the money"). p.52a.

Moreover, even if the Release filed by Merchants had purported to be a release on behalf of its trust accounts, *which it did not*, since Merchants acted only in its own interest, with the intent to keep the settlement proceeds for itself and did not obtain an assignment of its trusts' rights from its trust clients when it made its payment in the Vermont action, Merchants was not entitled to release the trusts' claims in any event. The Court's finding that Merchants' Release was "invalid" precluded the Release from extinguishing legal rights belonging either to the trusts or the owners of such trusts.

The lower courts' holdings deprived Petitioners of their due process rights as their claims against the defendants below were held to have been released without their knowledge or consent. Due process precludes an intermediary or nominee, such as a trustee, bank or brokerage firm, from making the opt out decision on behalf of the class member, when the nominee is acting not in the interest of the class member but, rather, in its own interest and contrary to the interests of those class members.

C. Due Process and Fed.R.Civ.P. 23 Were Violated By Imposing On The Class Members The Risk Of Future Litigation To Obtain Their Settlement Proceeds.

In the context of a settlement, the Court has a fiduciary duty to protect the interests of the absent class members. *See Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) ("the district court serves as a fiduciary who must serve as a guardian of the rights of absent class members"); *In re General Motors Corp. Pick-Up Fuel Tank*, 55 F.3d 768, 805 (3d Cir. 1995).

Moreover, the court is obligated to consider and protect the interests of third parties whose interests are impacted by a settlement approval. *Donovan v. Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1984) (court can not brush aside complaint by third parties regarding impact of the settlement).

Even though the Court acknowledged that Merchants, the trustee, was acting in its own interest, which was contrary to those of the trusts and trust beneficiaries, the Final Judgment nevertheless provides that Merchants be given the settlement proceeds, "as trustee," unless a trust client convinces a Court, in advance thereof, to request a transfer of the escrowed funds. Notwithstanding, Merchants continues to assert its ownership of these proceeds. The Court's actions are contrary to longstanding trust law holding that the proceeds of the res, including proceeds of litigation brought due to damage to the trust, belong to the trust. As this extensive body of law mandates, *the proceeds must be paid to the trusts and/or their owners* (to the extent the trusts have been terminated) because *Merchants* has failed to demonstrate that the normal rules of trust law do not apply and that it, the trustee, is somehow legally entitled to such proceeds.

The lower courts erred in entering and affirming an Order for Final Judgment which imposes on the trusts, or the trust's owners, the potential, indeed probable, prejudice and burden of initiating and succeeding in litigation designed to force Merchants to pass these proceeds on to the trusts and the beneficiaries, before receiving their settlement proceeds in this matter. *See Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975), cert. denied 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975) (Court must act as a fiduciary to absent class members); *Dekro v. Stern Bros. & Co.*, 571 F.Supp. 97 (D.Minn. 1987) (court must assure that the interests of absent class members are protected); *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981) (advantage to the class cannot be obtained by the uncompensated sacrifice of others). As it was the trustee which sought to buck hundreds of years of legal precedent, the Court, pursuant to its fiduciary duties owed to the absent class members, was obligated to order a direct payment to these class

members unless *Merchants* was able to obtain an appropriate court order demonstrating its entitlement to such proceeds.

III. THE COURTS' DENIAL OF INTERVENTION WAS CONTRARY TO FED.R.CIV.P. 24

Petitioners moved to intervene pursuant to F.R.C.P. 24(a)(2), individually and on behalf of all people or entities who purchased shares of the Piper Fund through Merchants. Intervention will be granted where (1) the proposed intervenor has an interest in the subject matter of the action; (2) the interest may be impaired; and (3) the interest is not adequately represented by an existing party to the action. Here, the inadequacy prong of Rule 24 was met as the district court specifically held that the interests of the Vermont Class were not adequately represented by the existing parties in the case below. p.50a. *See Trobvich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972).

Moreover Petitioners clearly claimed an interest in the subject matter of the litigation in that they continued to suffer sizeable out-of-pocket losses, notwithstanding Merchants' payment; Merchants sought to intercept and keep their settlement proceeds in this matter; and the trust beneficiaries were not only included in the settlement class definition, but had an interest in speaking for their trust accounts, as the Court found that Merchants, the trustee, was acting in its own interest and not in the interests of its trust accounts. Moreover, the district court's decision purports to bind Petitioners and the rights foreclosed by that decision constitute an interest under Rule 24. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134-136, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967).

Finally, the Courts' actions below *actually* impaired various interests claimed by the Petitioners, including foreclosing any action by the trusts' beneficiaries against the defendants arising out of the initial investment in the Piper Fund; placing on the trusts and/or their owners the risk of having to file and litigate a further claim before being able to receive their settlement proceeds; holding that Merchants will receive, "as trustee" the disputed settlement

proceeds, including those belonging to the owners of canceled trust accounts; holding that the beneficial owners were not members of the settlement class; effectively depriving the trust clients of the right to opt out of the settlement, whether on their own behalf or on their trust accounts' behaves; and denying the Objectors' Motion for an Award of Attorneys' Fees.

Eighth Circuit law now permits courts to deny intervention as of right even if the intervenors have a interest which is affected by the outcome of the litigation and the Court finds that that interest is not adequately represented by existing parties. Such a holding is contrary to Rule 24, the pronouncements of this Court and the holdings of all other circuits.

CONCLUSION

Petitioners respectfully request that the Court grant certiorari. This Court's prior decisions have made clear that the due process rights of absent class members in a Rule 23(b)(3) class are of paramount importance. The legal issues presented by this petition have the potential for reoccurrence whenever an intermediary or nominee, such as a bank, brokerage firm, or trustee, purports to be acting on behalf of members of such a class. It is important that the lower courts understand that, when aware that the nominee is acting, or is even alleged to be acting, contrary to the class members' intent, the Court must ensure that the class member directly receives both their due process rights and their settlement proceeds.

Equally as important are the issues presented by the common fund and benefit doctrines. Both the courts and class counsel must be made aware that, even after a fund is created, the benefit is not conferred until the class receives that benefit. Class Counsel should understand that they are not free to advocate positions which would eviscerate their clients' interests in a settlement. On the other hand, so as to encourage meritorious objections to settlements, objectors who confer substantive benefits on the class must be held to be entitled to compensation, especially when they have been forced to object due to class counsel's refusal to protect the class' interests.

Dated: November 25, 1998 Respectfully submitted,

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APPENDIX

EXHIBIT A

Slip Copy
Unpublished Disposition

(Cite as: 1998 WL 413986 (8th Cir.(Minn.))

NOTICE: Eighth Circuit Rule 28A(k) governs citation of unpublished opinions and provides that they are not precedent and generally should not be cited unless relevant to establishing the doctrines of res judicata, collateral estoppel, the law of the case, or if the opinion has persuasive value on a material issue and no published opinion would serve as well.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

In Re: PIPER FUNDS, INC. INSTITUTIONAL GOVERNMENT INCOME PORTFOLIO LITIGATION.
Richard J. Rodney, Jr., Plaintiff—Appellee,
v.
PIPER FUNDS, INC. INSTITUTIONAL GOVERNMENT INCOME PORTFOLIO, et al.,
Defendants—Appellees.
Leon J. SAVOIE, et al., Appellants.

No. 97-2132.

United States Court of Appeals, Eighth Circuit.
July 24, 1998.

Appeal from the United States District Court for the District of Minnesota

Before RICHARD S. ARNOLD*, Chief Judge, LAY and LOKEN, Circuit Judges.

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*The Honorable Richard S. Arnold stepped down as Chief Judge of the United States Court Appeals for the Eighth Circuit at the close of business on April 17, 1998. He has been succeeded by the Honorable Pasco M. Bowman, II.

PER CURIAM.

*1 Appellants are a class of trust settlors and beneficiaries. Their trustee, Merchants Trust Company of Burlington, Vermont, invested some $40 million in the Piper Funds, Inc. Institutional Government Income Portfolio. When that investment soured, appellants sued Merchants in the United States District Court for the District of Vermont. Meanwhile, a securities class action brought in the District of Minnesota against the Portfolio and related defendants resulted in a settlement approved by the district court. [FN1] Merchants as trustee was the class member ostensibly entitled to the $4 to $4.5 million of settlement fund proceeds allocated to its Portfolio investments. Merchants argued it was entitled to these settlement proceeds outright, as an offset to voluntary payments it had made to restore appellants' trusts. Appellants countered by filing their own claims as members of the Piper class, moving to intervene, objecting to the class action settlement because it provides for payment directly to Merchants, and asserting a claim for attorney's fees out of the settlement fund.

The district court concluded it had jurisdiction to adjudicate all aspects of the class action litigation but declined to exercise any supplemental jurisdiction it might have to resolve the dispute between appellants and Merchants. The court denied appellants' motion to intervene and their direct claims against the settlement fund. Acknowledging that the settlement class was broadly defined in the settlement agreement, the court reasoned that allowing trust beneficiaries and their trustee to participate in the settlement would result in a double recovery, and that the beneficiaries should be excluded because they had no direct cause of action against the Piper defendants. However, to protect the beneficiaries' interests vis-a-vis Merchants, the court invalidated Merchants' Claim and Release Form to the extent it designated Merchants as Payee, directed that no distribution of settlement proceeds be made to Merchants for sixty days to give appellants an opportunity to seek further relief from a Vermont court, and ordered that any subse-

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FN1. The HONORABLE PAUL A. MAGNUSON, Chief Judge of the United States District Court for the District of Minnesota.

quent distribution to Merchants be made payable "to Merchants, as trustee for the Trust." Finally, the court denied appellants' claim for attorney's fees from the settlement fund, concluding that appellants' attorneys had not conferred benefit on any member of the settlement class.

Appellants challenge the district court's final order on numerous grounds, while the Piper class plaintiffs and class defendants join in urging us to affirm. After careful review of the record, we conclude the district court made an appropriate disposition of the disputed portions of the settlement fund and did not abuse its discretion in declining to exercise supplemental jurisdiction and in denying appellants' claim for an attorney's fee award. The court carefully preserved appellants' ability to litigate their unresolved claims against Merchants in Vermont, while ensuring that distribution of this portion of the settlement proceeds would serve to release claims of appellants and Merchants against the Piper class defendants. We conclude that an extended opinion would be of no precedential value. Accordingly, we summarily affirm. See 8th Cir. R. 47B. Appellants' motion for leave to file a supplemental memorandum is denied.

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 97-2132MNST

Richard J. Rodney, Jr., et al.
Appellees,

Appeal from the United States District Court for the District of Minnesota

v.

Leon J. Savoie, et al.,
Appellants.

ORDER

The petition for rehearing filed by the appellants has been considered by the court and is denied.

August 27, 1998

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: Piper Funds Inc. Institutional Government Income Portfolio Litigation

Master File No. 3-94-587

PRELIMINARY ORDER

This document relates to:

All Actions

Originally, this matter was before the Court upon Leon and Marion Savoie's Objection, in part, to Final Approval of Settlement and Motion for Attorneys' Fees in the above-captioned matter. Leon and Marion Savoie ("the Savoies") objected to the final approval of the Settlement Agreement in this matter to the extent that it would have distributed certain monies to The Merchants Trust Company and its affiliates, including Merfarm & Co., Inc., The Merchants Bank, and The Merchants Bancshares (collectively, "Merchants"). The Savoies also objected to Lead Class Counsel's motion for attorneys' fees to the extent that it requested an award of fees relating to the portion of the Settlement Fund allocated to Merchants.

In an order dated December 14, 1995, the Court denied the Savoies' objections. The Savoies filed an expedited motion for reconsideration of that order and a motion to stay execution of final judgment on December 30, 1995. Shortly thereafter, the Piper Defendants filed a motion to vacate this Court's December 14, 1995 Order for Final Judgment and the order denying the Savoies'

objections, which Plaintiffs joined in part. In response to these motions and after reviewing the parties' submissions, the Court vacated its December 14, 1995 Order for Final Judgment and entered a new Order for Final Judgment on January 11, 1996. The new order severed the dispute between the Savoies and Merchants (the "Merchants Controversy") from the rest of the settlement, entered final judgment on all other settlement issues, and directed that the Merchants Account Share not be distributed pending further order of the Court. In a second January 11, 1996 order, the Court vacated the December 14, 1995 Order denying the Objection of Leon and Marion Savoie and modified the December 14, 1995 Order denying the Savoies' motion for attorneys' fees. The second order directed that the pro rata share of attorneys' fees attributable to the Merchants Account Share not be distributed until further order of the Court and ordered that the Savoies and Merchants submit to the Court memoranda addressing whether the Court has jurisdiction to resolve the dispute between them and whether venue here is proper. The Court now addresses the issues raised by those memoranda, as well as memoranda submitted by Plaintiffs and the Piper Defendants.

In addition, the Savoies have submitted a motion to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all other purchasers of shares in the Institutional Government Income Portfolio ("the Fund") purchased through Merchants during the class period, and Merchants has filed a conditional motion to intervene. The Court considers these motions as well.

Based upon the files, records, and proceedings herein, and based upon the written submissions of the parties, the Court holds that it has subject matter jurisdiction over the federal questions raised in this class action securities litigation. 28 U.S.C. §1331. The Court's subject matter jurisdiction specifically extends to, among other things, approval of the Settlement Agreement reached in this litigation, determination as to who is the proper class member associated with the Merchants Account Share, determination of sufficiency of notice of settlement class members, initial distributions from the Settlement Fund (including compliance with the requirement under the Settlement Agreement that proceeds not be

distributed by the Escrow Agent in the absence of a valid Claim and Release Form), and issues relating to awards of attorneys' fees. See Fed. R. Civ. P. 23(e). Venue is proper in this District with respect to all issues over which the Court has subject matter jurisdiction. 28 U.S.C. §1391.

The Piper Defendants have raised the issue of whether notice to Merchants of the Settlement Agreement constituted adequate notice to the Trust. Ordinarily, Merchants as trustee would be authorized to accept the settlement on behalf of the Trust. See Restatement of Trusts (2d) §192. Thus, the Court would not be required to provide notice to any person or entity besides Merchants, notice to Merchants would constitute adequate notice to the Trust. Here, however, Merchants has indicated that it plans to keep the settlement proceeds for itself in partial compensation for an earlier pay-out to its clients. This intended action directly conflicts with the Trust's interest in recovering the settlement proceeds. While Merchants' actions may be entirely appropriate due to its earlier payments, an issue that is not before this Court, its announcement nevertheless calls into question its authority to act on behalf of the Trust. It also places the Piper Defendants at risk of liability for any payments made to Merchants pursuant to the Settlement Agreement. See Restatement of Trusts (2d) §321 (stating that third parties are liable for participation in a breach of trust by a trustee if they made payment to the trustee with knowledge that the trustee intended to misapply the money).

As a precautionary measure to ensure that the Trust has received adequate notice and that Merchants has bound the Trust to the settlement of this case, the Court will provide to all Merchants' Trust clients notice of the Court's proposed holdings that Merchants had authority to settle all claims and that all claims against the Piper Defendants arising out of the Trust's investment in the Fund are barred and released by virtue of the settlement. The notice will enclose a copy of the Notice of Class Action Determination and Hearing on Settlement of Class action that was sent to all members of the settlement class and will provide Merchants' clients with an opportunity to be heard on concerns relating to this lawsuit or the Merchants Controversy. It will also inform Merchants' clients of their right to commence a separate

action in a more appropriate forum to determine who is entitled to the Trust's settlement proceeds.

Merchants shall be responsible for mailing this notice to its Trust clients and shall bear all costs of such mailing. Merchants shall certify to the Court that it has served the notice as directed and shall submit the names and addresses of its clients to the Court under seal.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The Court intends to enter an Order for Final Judgment in the form attached hereto as Exhibit A no earlier than 60 days after the date of this Preliminary Order;

2. As a precautionary measure, notice of the proposed final order and these proceedings in the form attached hereto as Exhibit B shall be provided to all persons with an interest in trust accounts that purchased shares of the Fund through Merchants during the class period. The notice shall be accompanied by a copy of the Class Notice and shall permit Trust clients to submit to the Clerk of the Court, within 30 days of the mailing of the notice, a written comment or objection to the content of the proposed final order or a request for a hearing. The decision whether to grant a hearing shall be within the sole discretion of the Court. A Trust client's failure to submit said comments, objections, or a request for a hearing within the 30-day period constitutes a waiver of the client's right to make such a submission; and

3. Merchants Bank (and, if applicable, its affiliates and subdivisions) shall:

a. Within 10 working days of this Order, given notice of the proposal final order and these proceedings by mailing a copy of the attached Notice to all persons with an interest in trust accounts that purchased shares of the Fund, or whose funds were otherwise used in connection with the purchase of shares in the Merchants Account, #00000061619, including but not limited to (i)

all persons to whom Merchants made payments in connection with the Fund and (ii) all persons to whom Merchants sent a letter dated September 7, 1995, relating to the settlement of this class action litigation;

b. Within 15 working days of this Order, file with the Court an affidavit of mailing of such Notice as required by the provisions of paragraph (a), above; and

c. Concurrent with the filing of the affidavit as required by paragraph (b), above, file with the Court, under seal, a list of the names and addresses of the persons and entities to whom such Notice was mailed. Such list shall remain sealed and the contents shall not be disclosed or divulged in whole or in part to parties to these proceedings, or to others, except as ordered by this Court after not less than 30 days advance written notice to Merchants and an opportunity for a hearing.

Dated: June 24, 1996

s/ _____

Paul A. Magnuson
United States District Court Judge

[EXHIBIT A]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: Piper Funds Inc. Institutional Government Income Portfolio Litigation

Master File No. 3-94-587

ORDER FOR FINAL JUDGMENT (PROPOSED)

This document relates to:

All Actions

INTRODUCTION

Originally, this matter was before the Court upon Leon and Marion Savoie's Objection, in part, to Final Approval of Settlement and Motion for Attorneys' Fees in the above-captioned matter. Leon and Marion Savoie ("the Savoies") objected to the final approval of the Settlement Agreement in this matter to the extent that it would have distributed certain monies to The Merchants Trust Company and its affiliates, including Merfarm & Co., Inc., The Merchants Bank, and The Merchants Bancshares (collectively, "Merchants"). The Savoies also objected to Lead Class Counsel's motion for attorneys' fees to the extent that it requested an award of fees relating to the portion of the Settlement Fund allocated to Merchants.

In an order dated December 14, 1995, the Court denied the Savoies' objections. The Savoies filed an expedited motion for reconsideration of that order and a motion to stay execution of final judgment on December 30, 1995. Shortly thereafter, the Piper Defendants filed a motion to vacate this Court's December 14, 1995, Order for Final Judgment and the order denying the Savoies' objections, which Plaintiffs joined in part. In response to these motions and after reviewing the parties' submissions, the Court vacated its December 14, 1995 Order for Final Judgment and entered a new Order for Final Judgment on January 11, 1996. The new order severed the dispute between the Savoies and Merchants ("the Merchants Controversy") from the rest of the settlement, entered final judgment on all other settlement issues, and directed that the Merchants Account Share not be distributed pending further order of the Court. In a second January 11, 1996 order, the Court vacated the December 14, 1995 Order denying the Objection of Leon and Marion Savoie and modified the December 14, 1995 Order denying the Savoies' motion for attorneys' fees. The second order directed that the pro rata share of attorneys' fees attributable to the Merchants Account Share not be distributed until further order of the Court and ordered that the Savoies and Merchants submit to the Court memoranda addressing whether the Court has jurisdiction to resolve the dispute between them and whether venue here is proper. The Court entered a Preliminary Order on June 24, 1996, affording Merchants' Trust clients thirty days to be heard on any issue relating to the Merchants Controversy or the underlying litigation. The Court now addresses the issues raised by the Savoies' and Merchants' memoranda, as well as memoranda submitted by Plaintiffs and the Piper Defendants and submissions by other Trust clients.

In addition, the Savoies have submitted a motion to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all other purchasers of shares in the Institutional Government Income Portfolio ("the Fund") purchased through Merchants during the class period, and Merchants has filed a conditional motion to intervene. The Court considers these motions as well.

BACKGROUND

Merchants manages several types of trust accounts for its clients, including discretionary trust accounts and " Wealthbuilder" trust accounts. Clients open Wealthbuilder accounts as an alternative to certificates of deposit or savings accounts. The clients can select from five investment categories, including a taxable fixed income fund. Merchants has complete discretion to decide which mutual funds comprise each investment category.

In October 1993, on the advice of Piper Capital Management Company, Merchants invested funds from both discretionary trust accounts and certain Wealthbuilder trust accounts (collectively, "the Trust") in the Piper Funds Inc. Institutional Government Income Portfolio (the "Fund"). Those funds had been invested previously in Federated GNMA shares. Merchants selected the Fund as the investment for the taxable fixed income investment category.

On June 9, 1993, the Savoies[1] opened a Wealthbuilder account at Merchants and chose the taxable fixed income category. In October, the funds in the Savoies' account were shifted from an investment in Federated GNMA shares to an investment in the Fund. Due to the well-documented problems with the Fund, the Savoies lost over $17,000. As a result of this loss, the Savoies filed a class action lawsuit against Merchants in federal district court in Vermont on October 25, 1994, alleging violations of federal securities laws, negligent misrepresentation, breach of contract, and

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[1] Marion Savoie has recently passed away. Leon Savoie continues in his litigation on behalf of himself, the Wealthbuilder Account of Leon J. And Marion Savoie, and all other persons and entities that that purchased shares in the Fund through Merchants.

breach of fiduciary duty. The class that the Savoies putatively represent has never been certified, and the lawsuit remains on appeal to the Second Circuit.[2]

Merchants decided to liquidate all investments in the Fund and reimburse its clients for their losses, as measured by the difference between the Fund's performance and the performance of the Federated GNMA shares. On December 28, 1994, Merchants paid its clients approximately $9.2 million; the Savoies received $17,318.70. Merchants did not ask for or obtain releases or assignments from its clients in return for the pay-out, but it believes that it has fully reimbursed its clients. In 1995, Merchants accepted the settlement in this action and has announced that it plans to keep the settlement proceeds to reimburse itself partially for the $9.2 million pay-out instead of distributing some or all of the proceeds to its Trust clients.

DISCUSSION

I. JURISDICTION

A. This Court Has Jurisdiction to Determination Who Is the Proper Class Member Associated with the Merchants Account Share and Thus Whether the Savoies Have Standing to Object to the Settlement Agreement.

Only those persons or entities who are parties to a settlement proceeding have standing to object to those proceedings. See, e.g., In re Viatron Computer Sys. Corp. Litig., 614 F.2d 11, 14 (1st Cir.), cert. denied sub nom. Arthur Andersen & Co. v. Stewart, 449 U.S. 826 (1980); In re Equity Funding Corp. Of Am. Sec. Litig.,

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[2] On appeal, Merchants is contesting a preliminary injunction that required it to place $500,000 in an escrow account for possible payment of the Savoies' attorneys' fees. Apparently, the only issues remaining in the case in Vermont are whether the federal district court there had subject matter jurisdiction to issue the preliminary injunction and whether the Savoies' attorneys are entitled to fees arising from a pay-out to Merchants' clients.

603 F.2d 1353, 1360-61 (9th Cir. 1979). Therefore, one who is not a settlement class member or a settling defendant may not object to a proposed settlement. See Fed. R. Civ. P. 23(e); Gould v. Alleco, Inc., 883 F.2d 281, 284 (4th Cir. 1989) (holding that nonclass members have no standing to object to settlement), cert. denied, 493 U.S. 1058 (1990). To determine whether the Savoies have standing to object to the distribution of the Merchants Account Share to Merchants as directed by the Settlement Agreement, the Court must determine whether the Savoies are settlement class members.

Clearly, this Court has federal question jurisdiction over the class action securities litigation brought against the Piper Defendants. 28 U.S.A. §1331. It is also undisputed that because Federal Rule of Civil Procedure 23 directs the Court to adjudicate all aspects of a class action litigation before it, the Court has jurisdiction to determine which parties are members of the settlement class. Thus, the Court has jurisdiction to determine whether the Savoies are members of the settlement class with standing to object to the Settlement Agreement.

B. The Savoies Are Not Proper Settlement Class Members.

Because a class action is a procedural device that combines the claims of similarly situated people or entities into one lawsuit, each member of the class must have an independent cause of action against the defendant to be properly included in the class. See State Sec. Ins. Co. v. Frank B. Hall & Co., 95 F.R.D. 496, 498 (E.D. Ill. 1982) (citing Zahn v. International Paper Co., 414 U.S. 291, 301 (1973), which held that each plaintiff in a class action lawsuit must satisfy jurisdictional amount in diversity case and that "one plaintiff may not ride in on another's coattails"); cf. Darrow v. Southdown, Inc., 574 F.2d 1333, 1336-37 (5th Cir.) (holding that because would-be objector could not have brought derivative action as shareholder on his own behalf, he could not object to settlement), cert. denied sub nom. D. Doyle Mize & Addis Corp. V. Darrow, 439 U.S. 984 (1978); Aks v. Bennett, 150 F.R.D. 187, 192 (D. Kan. 1993) (stating that ERISA trust beneficiaries who could not bring claims directly against third party could not be part of class action lawsuit against that third party). In other words, if the

Savoies, and Merchants' other clients, could not have brought an action against the Piper Defendants on their own behalf, they cannot be included in the class.

Because of the trust relationship that exists between the Savoies and Merchants, the Savoies do not have any independent claims against the Piper Defendants and thus cannot be considered settlement class members. When parties enter into a commercial trust relationship such as the one between the Savoies and Merchants, only the trustee, not the trust beneficiary, may bring suit against a third party for injury to the trust. Restatement (Second) of Trusts "280-282 (1957); see also In re New England Mut. Life Ins. Co. Litig., 841 F. Supp. 345, 348 (W.D. Wash. 1994), aff'd, 54 F.3d 786 (9th Cir. 1995); Aks, 150 F.R.D. at 191. The beneficiary cannot maintain an action at law against a third party unless the beneficiary is in possession of the trust property, Restatement (Second) of Trusts §281 (1957), nor can the beneficiary maintain a suit in equity against a third party unless the trustee improperly refuses or neglects to bring suit or is not subject to the court's jurisdiction. Restatement (Second) of Trusts §282 (1957); see also New England Mutual, 841 F. Supp. at 348; Aks, 150 F.R.D. at 192.
While Merchants did not initiate the class action litigation against the Piper Defendants, it did join the class action and thus took " reasonable steps to realize on claims which [it] holds in trust," as required by the Restatement (Second) of Trusts §177 (1957). The Savoies are not in possession of the Trust property. Merchants has not refused to bring suit against the Piper Defendants, and it is subject to this Court's jurisdiction. Furthermore, the Savoies have never alleged that Merchants colluded with the Piper Defendants in any way. Cf. New England Mutual, 841 F. Supp. at 348 ("At common law, if a trustee and a third party jointly participate in collusion in breach of trust, a beneficiary may have the right to sue the third party directly."). Thus, because the Savoies have no independent claims against the Piper Defendants and because the exceptions listed in "281 and 282 do not apply, the Savoies are not members of the settlement class. The settlement class member that relates to the Merchants Account Share is the Trust itself, acting through Merchants as the trustee. Cf. Nathan Gordon Trust v. Northgate Exploration, Ltd., 148 F.R.D. 105, 106-07 (S.D.N.Y. 1993) (certifying a class in securities litigation class action suit

brought by a trust, which was purchaser of stock, through its trustee); Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704, 715 (D. Colo. 1996) (stating that the legal entity in a trust relationship is the trustee acting on behalf of the trust, not the beneficiary).

The Savoies do not have any independent claims against the Piper Defendants for a second reason: they are not proper plaintiffs in a securities action against the Piper Defendants, irrespective of the trust relationship between the Savoies and Merchants. Federal securities laws were enacted to protect buyers and sellers of securities and to ensure that buyers and sellers are provided with truthful information about the securities being bought or sold. See Congregation of the Passion v. Kidder Peabody & Co., 800 F.2d 177, 181 (7th Cir. 1986) ("[T]he relevant inquiry is whether plaintiffs were denied information that would or might have been useful to them in deciding whether to purchase or sell securities which they did actually purchase or sell.") (quoting O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54, 60 (7th Cir. 1979)); Birnbaum v. Newport Steel Corp, 193 F.2d 461, 464 (2d Cir.) (holding that '10(b) and Rule 10b-5 "extended protection only to the defrauded purchaser or seller"), cert. denied, 343 U.S. 956 (1952). In some contexts involving trust beneficiaries, courts have relaxed the requirement instituted by Birnbaum that plaintiffs in securities actions must have either bought or sold the securities themselves. See, e.g., Kirshner v. United States, 603 F.2d 234, 237 (2d Cir. 1978) (holding that beneficiary of a pension trust had standing to bring securities claim against trustees of fund), cert. denied, 442 U.S. 909 (1979); James v. Gerber Prods. Co., 483 F.2d 944, 948-49 (6th Cir. 1973) (allowing securities action by beneficiary against trustee and third party where trustee was allegedly party to the fraud and would not sue on beneficiary's behalf); Klamberg v. Roth, 425 F. Supp. 440, 442 (S.D.N.Y. 1976) (holding that beneficiary can bring securities claim against trustee, especially when transaction was not at arm's length); Heyman v. Heyman, 356 F. Supp. 958, 966 & n.9 (S.D.N.Y. 1973) (permitting beneficiary to bring claim against trustee and purchaser because stock sale was not an arm's-length transaction). But see Santa Fe Indus., Inc. V. Green, 430 U.S. 462, 477-80 (1977) (finding no cause of action under '10(b) and Rule 10b-5 for breach of fiduciary duty in

selling stock); Pross v. Katz, 784 F.2d 455 (2d Cir. 1986) (holding that a breach of fiduciary duty does not violate '10(b)). In instances where an individual gives complete investment discretion to another party such as an investment advisor, however, the individual cannot bring federal securities claims against third parties who conduct business with that advisor at arm's length. See, e.g., Congregation of the Passion, 800 F.2d at 181 (holding that plaintiff could not bring securities claims against third-party dealers because plaintiff made no investment decisions); Sheldon Co. Profit Sharing Plan & Trust v. Smith, 828 F. Supp. 1262, 1270 (W.D. Mich. 1993) (same); cf. Lewis v. Walston & Co., 487 F.2d 617, 622 (5th Cir. 1973) (individuals who purchased stock through a relative did not have right to sue third party; only relative could sue).

The Savoies could not have brought this securities action on their own against the Piper Defendants because they, like the plaintiffs in Congregation of the Passion and Sheldon, gave complete discretion investment to their investment advisor, Merchants, when they opened a Wealthbuilder account and selected the taxable fixed income fund as their investment category. While the Savoies could have switched investment categories, withdrawn funds from their account, or closed the account, Merchants had complete discretion to decide whether to buy or sell shares of a particular mutual fund with the Savoies' money. See Congregation of the Passion, 800 F.2d at 181 (finding that plaintiff retained authority to vary amount of the investment fund and to dismiss advisor but that that authority related to relationship with advisor and not to any particular decision to buy or sell a security). The Savoies made no investment decisions; Merchants held title, reviewed all investment materials, and voted all shares. Thus, the Savoies could not have brought a securities action against the Piper Defendant because they made no decisions that would have been affected by any misleading information provided by the Piper Defendants. See id. Furthermore, there has been no suggestion that the dealings between Merchants and the Piper Defendants have been anything but arm's length transactions. This fact distinguishes the instant case from several cases cited by the Savoies, which support an independent cause of action by trust beneficiaries if the trustee and third parties act in concert. See James v. Gerber Products Co., 483 F.2d 944 (6th Cir. 1973); Heyman v. Heyman, 356 F. Supp. 958

(S.D.N.Y. 1973). The Savoies are not members of the settlement class and are not entitled to receive a pro rata portion of the Merchants Account Share directly.

This Court's determination that the Savoies, and Merchants' other Trust clients, are not class members does not prejudice their claim to the settlement proceeds. Presumptively, whatever money is recovered by Merchants pursuant to the Settlement Agreement is held subject to the Trust since Merchants may participate in the settlement only as a trustee. See Restatement (Second) of Trusts §280 cmt. h (1957). As trust beneficiaries, the Savoies have rights that can be asserted under state law if they believe that Merchants has acted improperly in its role as trustee and that they are entitled to some or all of the settlement proceeds.[3]

C. This Court Does Not Have Jurisdiction to Resolve the Dispute Between the Savoies and Merchants Over the Settlement Proceeds Payable in Connection with the Merchants Account Share.

As discussed above, this Court has federal question jurisdiction over the class action litigation that underlies the Merchants Controversy because that class action alleged violations of federal securities laws against the Piper Defendants. The Savoies' claim of entitlement to a potion of the settlement proceeds arises under state law of trusts and breach of fiduciary duty, not under federal law. Consequently, the Court can exercise jurisdiction over the Merchants Controversy only if the dispute falls within the reach of

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[3] Merchants has announced its intention to keep the settlement proceeds for itself as reimbursement for the pay-out it made to its clients in November 1994. This action by Merchants suggests that the Savoies will have to file a claim against Merchants to recover any portion of the Merchants Account Share and, as discussed in Part II, below, exposes the Piper Defendants to liability for any payment to Merchants. Merchants' announced intentions do not call into question the Court's finding that Merchants did not improperly refuse or neglect to bring suit because Merchants did join the settlement class as trustee for the Trust and makes a credible argument that its clients have been sufficiently reimbursed for their losses.

the federal supplement jurisdiction statute, 28 U.S.C. §1367. Section 1367 provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ." 28 U.S.C. '1637(a); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (holding that a federal district court may exercise supplemental jurisdiction over a state claim only if the state claim and the underlying federal claim "derive from a common nucleus of operative fact").

The issues involved in the Savoies' claims against Merchants are not so related to the claims in the underlying securities litigation as to form part of the same case or controversy. The Merchants Controversy does not affect the rights or obligations of the Piper Defendants, the Named Plaintiffs, or lead Class Counsel. It does not alter the amount of money being paid out by the Piper Defendants; rather, it determines who will receive a small portion of those funds. It raises novel issues of Vermont state trust law that are entirely different from those involved in the original federal securities litigation and the determination of the settlement's fairness. Moreover, while the Merchants Controversy involves a dispute over a payment from a settlement fund created by the core litigation, the dispute does not derive from a common nucleus of facts. The Merchants Controversy involves allegedly inappropriate conduct by Merchants in investing its clients' funds, whereas the underlying litigation involves allegedly illegal conduct by the Piper Defendants in providing information to investors. The Court does not have supplemental subject matter jurisdiction over the Merchants Controversy pursuant to 28 U.S.C. §1367(a).

Even if the Court did have supplemental jurisdiction over the Merchants Controversy, however, it would decline to exercise that jurisdiction pursuant to 28 U.S.C. §1367(c). Section 1367(c) enables a court to decline jurisdiction if the claim raises a novel or complex issue of state law, the district court has dismissed all claims over which it has original jurisdiction, or, in extraordinary circumstances, there are other compelling reasons for declining

jurisdiction. 28 U.S.C. §13679(c)(1), (3), (4). The Merchants Controversy raises a novel issue of Vermont state trust law, and the Court has dismissed or entered judgment on all claims over which it has original jurisdiction. Furthermore, the parties to the Merchants Controversy are located in Vermont, as are most witnesses and documents. This dispute should be heard in Vermont sate court or as a pendant claim to the litigation between these two parties that is currently pending in federal court in the District of Vermont.

The Savoies also argue that this Court expressly retained jurisdiction over the substantive elements of the Merchants Controversy in its January 11, 1996, Orders and that by vacating its December 14, 1995, Order denying the Savoies' objections to the settlement, the Court determined that the Savoies are members of the settlement class. The Savoies state: "On January 11, 1996, this Court vacated its December 14, 1995 Order, which had found that the Savoies had no standing in this action. Thus, the clear import of the Court's reversal is that the Savoies . . . are proper members of the settlement class in this case." Mem. Supp. Savoies' Mot. for Intervention at 2 (emphasis in original). The Savoies also write that "[w]hile the Court has not explicitly expressed its findings of standing, we believe it clear that the Court has moved past this issue and now seeks to resolve the substantive issues raised by the Savoies [sic] Objection." Savoies' Mem. regarding Ct.'s Jurisdiction at 37.

The Court does not appreciate the Savoies' mischaracterization of its actions. The Court never reversed its December 14, 1995, Orders or decided that the Savoies were settlement class members; no reasonable reading of the January 11, 1996, Orders could produce such an interpretation.[4] Rather, the Court vacated portions of the December 14, 1995, Orders so as to consider more fully the propriety of its decision as to the Savoies' standing to object to the settlement. As indicated in the January 11, 1996,

[4] The Court found that "[b]efore the Court can resolve the substantive issues involved in the dispute between the Savoies and Merchants, it must determine whether the dispute is properly before it." Order Vacating Denial at 2. The court also concluded that "the unique facts and issues surrounding the Merchants Controversy justify a further, separate examination by this or possibly some other Court." Order for Final Judgment at 3.

Order for final Judgment and Order vacating the denial of the Savoies' objections, the Court sought additional submissions from the parties to assist it in determining whether the substantive dispute between the Savoies and Merchants was properly before it. The Court never specifically retained jurisdiction over the substantive dispute; it retained jurisdiction so that it could decide whether to retain jurisdiction over the substantive dispute. In any event, the issue of whether the Court has properly asserted supplemental jurisdiction over a state claim remains open throughout the litigation, enabling the Court to reassess the propriety of jurisdiction at any time during the proceedings. See United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966). As the above analysis demonstrates, the Court has now determined that it does not have such jurisdiction.

D. Savoies' Motion for Intervention as of Right Does Not Provide Adequate Jurisdictional Grounds.

The Savoies have also filed a motion for intervention as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. They argue that the Court will have ancillary jurisdiction over their claims if it grants their motion. Rule 24(a) provides for intervention as of right when an applicant claims an interest relating to the property or transaction that is the subject of the action and when the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. See Fed. R. Civ. P. 24(a) (2); see also Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir. 1992). The Court agrees that the Savoies' interests are not adequately represented by existing parties; however, the Savoies' ability to protect any interest they may have in the Merchants Account Share will not be impeded by the Court's intended disposition of the Merchants Controversy. Because the Court has decided that it does not have subject matter jurisdiction over the Merchants Controversy and that the dispute between the Savoies and Merchants must be resolved in

some other court, this Court will not prejudice the Savoies in any way by not granting their motion to intervene here. Therefore, the Savoies' motion for intervention as of right is denied.[5]

II. SUFFICIENCY OF NOTICE AND OF CLAIM AND RELEASE FORM

A. Notice to Merchants May not Constitute Adequate Notice to the Trust.

The Piper Defendants raised the issue of whether notice to Merchants of the Settlement Agreement constituted adequate notice to the Trust. Because the Court has jurisdiction over the settlement of the class action litigation, it clearly has jurisdiction to assess the adequacy of notice of the Settlement Agreement to settlement class members.

Ordinarily, Merchants as trustee would have been authorized to accept the settlement on behalf of the Trust. See restatement (Second) of Trusts §192 (1957). Thus, the Court would not have been required to provide notice to any person or entity besides Merchants; notice to Merchants would have constituted adequate notice to the Trust.[6] Here, however, Merchants has indicated that it plans to keep the settlement proceeds for itself in partial compensation for its earlier pay-out. This intended action directly conflicts with the Trust's interest in recovering the settlement proceeds. While Merchants' actions may be entirely appropriate due to its earlier payments to its clients, an issue that is not before this Court, its announcement nevertheless calls into question its authority to act on behalf of the Trust. It also places the Piper Defendants at risk for liability for any payments made to Merchants pursuant to the Settlement Agreement. See Restatement (Second) of Trusts

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[5]Because the Court does not grant the Savoies' Motion to intervene, will not retain jurisdiction over the Merchants Controversy, and will not order any portion of the Merchants Account Share transferres to a second court absent leave of that court, Merchants' Conditional Motion to Intervene is denied as moot.

[6]The individual trust clients would not have been entitled to separate notice because they are not members of the settlement class.

'321 (1957) (stating that third parties are liable for participation in a breach of trust by a trustee if they made payment to the trustee with knowledge that the trustee intended to misapply the money).

As a precautionary measure to ensure that the Trust received adequate notice and that Merchants has bound the Trust to the settlement of this case, the Court provided to all Merchants' Trust clients notice of the Court's proposed holdings that Merchants had authority to settle all claims and that all claims against the Piper Defendants arising out of the Trust's investment in the Fund are barred and released by virtue of the settlement. The notice enclosed a copy of the Notice of Class Action Determination and Hearing on Settlement of Class Action that was sent to all members of the settlement class and provided Merchants' clients with an opportunity to be heard on concerns relating to this lawsuit or the Merchants Controversy. It also informed Merchants' clients of their right to commence a separate action in a more appropriate forum to determine who is entitled to the Trust's settlement proceeds.

Merchants was responsible for mailing this notice to its Trust clients. Merchants certified to the Court that it served the notice as directed and submitted the names and addresses of its clients to the Court under seal. The names and addresses shall not be released without notice and an opportunity to be heard.

B. Merchants' Claim and Release Form is Invalid.

In order to receive payment under the Settlement Agreement, class members must submit a Claim and Release Form identifying the person to be paid and affirmatively releasing the claims encompassed by the Settlement Agreement. The claim and release process does not affect the finality of the Settlement Agreement. Because the claim and release process is integral to the administration of the Settlement Agreement, the Court has jurisdiction to determine whether a would-be claimant has submitted a valid Claim and Release Form.

Under the Settlement Agreement, trustees submitting Claim and Release Forms must expressly represent that they are authorized to release all claims on behalf of the trusts. Ordinarily, payment is then made to the trustee based on the presumption that the trustee will perform its duties and pass along the settlement proceeds to the trust for the benefit of the beneficiaries. Because Merchants has announced that it intends to keep the settlement proceeds for itself, however, the validity of its Claim and Release Form is questionable. To the Court's knowledge, none of Merchants' clients have approved its plans to keep the settlement proceeds, nor has any court determined that Merchants may keep the money for itself.

Without authorization form the Trust or a court, Merchants cannot keep the Trust's settlement proceeds for itself and cannot submit a Claim and Release Form designating itself as payee. In addition, the Piper Defendants face liability from the Trust if they give Trust property to Merchants knowing that Merchants intends to keep that property for itself. See Restatement (Second) of Trusts §321 (1957). The notice procedure outlined above gave Merchants' clients an opportunity to challenge Merchants' claim to the settlement proceeds. Only if Merchants' clients have an opportunity to be heard and an appropriate Court rules that their rights to the settlement proceeds have been extinguished by Merchants' $9.2 million pay-out can Merchants submit a valid Claim and Release Form that designates itself as payee.

C. The Merchants Account Share Shall Remain in Escrow Pending Transfer of Funds to a Vermont Court at the Request of a Party.

As the Court determined in Section I above, under ordinary circumstances Merchants would be authorized to receive the Merchants Account Share on behalf of the Trust, which is the settlement class member here. But because of the questions raised as to the propriety of Merchants' intentions to retain the Merchants Account Share for itself instead of distributing it to the Trust, and because Merchants' Claim and Release Form is currently invalid, the Merchants Account Share cannot be released to Merchants at this time. While this Court does not have subject matter jurisdic-

tion over the Merchants Controversy, it can protect the interests of the Savoies and Merchants' other Trust clients by ordering that the Merchants Account Share be held for sixty days. Trust clients may, within the sixty-day period, file a claim in the appropriate Vermont court or a pendant claim in the appropriate federal court and obtain permission from that court allowing them to deposit the settlement proceeds in the appropriate Vermont court and obtain permission from that court allowing them to deposit the settlement proceeds with the Court pursuant to Rule 67 of the Vermont Rules of Civil Procedure.[7] If this Court is not directed to deposit the Merchants Account Share with another court within sixty days, it shall pay the money directly to Merchants. This procedure allows the Court to protect the interests of the Savoies and the other Trust clients even though it lacks jurisdiction to resolve the Merchants Controversy on the merits.

III. ATTORNEYS' FEES

In addition to objecting to the planned distribution of the Merchants Account Share directly to Merchants, the Savoies also object to the proposed distribution to Lead Class Counsel of the attorneys' fees attributable to the Merchants Account Share. The Savoies argue that their counsel, Dennis Johnson, is entitled to a portion of those fees for his efforts on their behalf and on the behalf of the other Trust clients. Lead Class Counsel disagree with the Savoies' position. The Court, of course, has jurisdiction to determine whether the portion of the settlement proceeds attributable to attorneys' fees for Lead Class Counsel is fair and reasonable. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939). Necessarily, it also has jurisdiction to decide whether a particular portion of the attorneys' fees in a class action litigation should be awarded to an objector's attorneys.

Mr. Johnson argues that he is entitled to fees from the Settlement Fund established in this case because of the benefit conferred upon the class by the Savoies' objections to the Settlement Agreement. This argument is premised on the assumption that Merchants' Trust clients are members of the settlement class, an assumption that the Court has determined in Part I of this Order to

be incorrect. Mr. Johnson may eventually confer a benefit on his clients and on other of Merchants' clients. He has not, however, conferred a benefit on any member of the settlement class in this case and is not entitled to attorneys' fees on that basis.

Mr. Johnson also argues that he should be awarded attorneys' fees because he brought to the Court's attention a dispute--the Merchants Controversy--that can later be resolved by another court and thus provided the Court with comfort that the settlement was fair. As both Lead Counsel and the Piper Defendants point out in their submissions, Mr. Johnson has never represented a party to this litigation. He was not involved in any of the litigation or negotiation that led to the drafting and signing of the Settlement Agreement or the creation of the Settlement Fund. Mr. Johnson's efforts in this matter may affect who ultimately receives the Merchants Account Share, but the amount of money contained in the Settlement Fund will not be altered by the resolution of the Merchants Controversy, nor will the amount of the Merchants Account Share change in any way. The fact that a separate dispute exists over who is entitled to the Trust's settlement proceeds does not diminish Lead Class Counsel's role in securing the settlement in the first place.

The cases on which Mr. Johnson relies to support his argument are not on point and in fact support the opposite result. For example, the court in Howes v. Atkins stated that "[u]susally, if [objectors'] efforts did not improve the terms of the settlement, they do not receive a fee." 668 F. Supp. 1021, 1027 (E.D. Ky. 1987). The court made in exception in the case before it because the objectors' counsel substantially supplemented the attack on the settlement made by plaintiffs' counsel; although the terms of settlement remained the same, the court was "much more comfortable" with the substance of the settlement due to the efforts of objectors' counsel. Id. Here, Mr. Johnson's arguments did not affect or even pertain to the substance of the Settlement Agreement. In fact, Mr. Johnson did not make his first appearance before this Court until the July 31, 1995, hearing on preliminary approval for the settlement. His submissions do not fall into the exception carved out in Howes.

Several other cases cited by Mr. Johnson are equally inapposite. In In re Domestic Air Transportation Antitrust Litigation, the court wrote:

> If objectors' appearance sharpens the issues and debate on the fairness of the settlement, their performance of the role of devil's advocate warrants a fee award. Objectors deserving of compensation may cause the Court to spend even more hours in analyzing and assessing the complex agreement, and cast in sharp focus the question of the fair ness and adequacy of the settlement to all members of the class.

148 F.R.D. 297, 358 (N.D. Ga. 1993). Mr. Johnson's contribution does not match that described in the above quotation. The Court did not alter its view of the fairness or adequacy of the Settlement Agreement in any way based on Mr. Johnson's argument, largely because Mr. Johnson never questioned the fairness or adequacy of the Settlement Agreement. He questioned only Merchants' entitlement to the Merchants Account Share. If Mr. Johnson is to receive attorneys' fees, it must be in connection with the Merchants Controversy itself. The federal district court in Vermont has already escrowed $500,000 for that very purpose pending the resolution of the federal litigation currently before the Second Circuit.

Mr. Johnson also cites to Kiser v. Miller, for the proposition that attorneys' fees for an objector are appropriate to prevent fiduciary abuse by a trustee. 364 F. Supp. 1311, 1320 (D.D.C. 1973), aff'd in part, rev'd in part sub nom. Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974). In that case, however, the trustee charged with fiduciary abuse was the defendant to the case, not merely a potential recipient of settlement proceeds. Id. Mr. Johnson's arguments on this point are disingenuous at best.

Finally, Mr. Johnson argues that he should receive a portion of the attorneys' fees in this case pursuant to the common fund doctrine to the extent that Merchants' efforts to obtain reimbursement from the Piper Defendants for Merchants' pay-out to its

clients directly caused the Piper Defendants to come to the settlement table and dictated the parameters of the settlement fund In the case that Mr. Johnson cites in support of this proposition, Koppel v. Wien, the Second Circuit remanded the case to the district court for a hearing to determine causation based on the plaintiff's "strong showing that the undisputed facts establish causation." 743 F.2d 129, 135 (2d Cir. 1984). Here, there is not a scintilla of evidence that Merchants' participation in the class action directly influenced the Piper Defendants' participation in the settlement process. The fact that Merchants, along with hundreds of other class members, opted into the Settlement agreement does not on its own constitute anything resembling a "strong showing" that causation exists. Mr. Johnson's argument is without merit; his request that the Court reallocate the award of fees is denied.

CONCLUSION

This Court, by virtue of its federal question jurisdiction over the securities litigation brought against the Piper Defendants, has jurisdiction to determine who is the proper settlement class member associated with the Merchants Account Share. The Court can make this determination without resolving the substantive dispute between the Savoies and Merchants that prompted the Savoies' objections to the Settlement Agreement. Because of the trust relationship that exists between the Savoies and Merchants, and because the Savoies are not proper plaintiffs in a securities action against the Piper Defendants, the Savoies and Merchants' other Trust clients are not settlement class members in this litigation. The settlement class member associated with the Merchants Account Share is the Trust itself. The court lacks supplemental jurisdiction over the Merchants Controversy because the dispute does not form part of the same case or controversy as the underlying class action litigation. Even if supplemental jurisdiction did exist, however, the Court would decline to exercise that jurisdiction. Finally, because the Savoies' attorney did not confer a benefit on the settlement class in this instance, the Savoies' request that the Court reallocate the award of fees is denied.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. All objections to notice relating to the Merchants Account are DENIED. The terms of the Court's January 11, 1996, Order for Final Judgment apply fully to the Merchants Account . Accordingly, without limiting the foregoing, those provisions that permanently barred all Settled Claims apply to all persons potentially interested in the Merchants Controversy so as to bar permanently all Settled Claims arising out of the Trust's purchase of shares in the Fund;

2. The Court does not have subject matter jurisdiction over the Merchants Controversy or, in the alternative, declines to exercise supplemental jurisdiction over the Merchants Controversy. Nothing herein shall be construed to affect the outcome of that dispute;

3. The Savoies' Motion on Behalf of Themselves and All Other Purchasers of Piper Jaffray Shares Purchased Through Merchants to Intervene Pursuant to Rule 24(a)(2) (Clerk Doc. No. 236) is DENIED.

4. Merchants' Conditional Motion to Intervene (Clerk Doc. No. 243) is DENIED AS MOOT;

5. Attorneys' fees payable out of the Merchants Account Share are awarded to Lead Class Counsel on the same terms and conditions as apply to all other accounts. The request of the Savoies' attorney, Dennis Johnson, for a share of said attorneys' fees is DENIED. The Court's denial of Mr. Johnson's request for fees in this litigation is without prejudice to any claim he has asserted or may assert elsewhere for a share of the net settlement proceeds payable to the Trust based on his efforts on behalf of the Trust clients;

6. Merchants has submitted a Claim and Release Form affirmatively and validly releasing all claims against the Piper Defendants. Notwithstanding Merchants' designation of itself as payee, the Escrow Agent shall process Merchants' Claim

and Release Form as Follows: the Effective Date for this Order ("the Merchants' Effective Date") shall be 31 days after the date of this Order, unless this Order is appealed. If there is an appeal, the Merchants Effective Date shall be the date following the expiration of all appeals and periods for commencing further appeals. The Escrow Agent shall not distribute that portion of the Merchants Account Share payable to the Trust, after deducting the portion payable for attorneys' fees, until 30 days after the Merchants Effective Date. At the conclusion of that period, the Escrow Agent shall make the initial settlement cash payment and all future distributions payable to the Trust, in care of the court which has given leave to any or all Trust clients to deposit some or all of the Merchants Account Share with that court, pursuant to Vermont Rule of Civil Procedure. If no such leave has been granted by that time, the Escrow Agent shall make payment to Merchants, as trustee for the Trust; and

7. The Court hereby retains and reserves jurisdiction over (i) implementation of the Settlement Agreement and the distribution of settlement proceeds to another court or Merchants, on behalf of the Trust; (ii) the Settlement Fund and the Escrow Agent; (iii) the Merchants Controversy until the Effective Date contemplated in Paragraph 6 of this Order; and (iv) all parties to the Settlement Agreement and all Settling Class Members for the purpose of enforcing and administering the Settlement Agreement and this Settlement.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: _____, 1997

s/_____

Paul A. Magnuson
United States District Court Judge

[EXHIBIT B]

NOTICE FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA OF A PROPOSED FINAL ORDER RESOLVING CLASS ACTION SETTLEMENT ISSUES ARISING OUT OF THE IN RE PIPER FUNDS INC. INSTITUTIONAL GOVERNMENT INCOME PORTFOLIO LITIGATION

TO: ALL PERSONS WITH AN INTEREST IN TRUST ACCOUNTS AT MERCHANTS TRUST COMPANY THAT PURCHASED SHARES IN THE INSTITUTIONAL GOVERNMENT INCOME PORTFOLIO DURING THE PERIOD JULY 1, 1991 TO MAY 9, 1994.

THIS NOTICE MAY AFFECT YOUR RIGHTS. YOU ARE URGED TO READ IT CAREFULLY AND IN ITS ENTIRETY. IF YOU WISH TO RESPOND TO, OR COMMENT ON, THE PROCEEDINGS, ISSUES, AND COURT ORDER DESCRIBED HEREIN YOU MUST NOTIFY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA IN WRITING WITHIN THE TIME PERIOD DESCRIBED BELOW. YOUR FAILURE TO DO SO BINDS YOU TO THE COURT'S ORDER, AND YOU WILL BE BARRED FROM CHALLENGING THE COURT'S FINDINGS AND CONCLUSIONS AT A LATER DATE.

BACKGROUND INFORMATION

This Notice is provided to you pursuant to a Preliminary Order of the United States District Court for the District of Minnesota entered on June 24, 1996 ("the Preliminary Order'), addressing issues relating to a settlement agreement in In re Piper Funds, Inc. Institutional Government Portfolio Litigation ("the Litigation").

In 1995, the parties to the Litigation entered into a settlement agreement ("the Settlement Agreement"), which provides for payment of approximately $67.5 million to Settlement Class

Members over a period of three years. Merchants Trust Company, its subsidiaries, and affiliates ("Merchants"), as trustee for the various Merchants trust accounts owning shares in the Institutional Government Income Portfolio ("the Trust"), decided to participate in the Settlement Agreement. The "Loss" incurred by the Merchants Account, as that term is defined and limited in the Settlement Agreement, is $9, 571, 197.84. Under the terms of the Settlement Agreement, the settlement proceeds attributable to the Merchants Account ("the Merchants Account Share"), less attorneys' fees, are estimated at approximately forty-three (43) percent of this defined Loss ("the Merchants Net Share"), although this estimate is subject to change. The settlement proceeds are payable over a three year period.

Whether Merchants or its Trust clients are entitled to the Merchants Net Share remains in dispute. Merchants previously paid approximately $9.2 million to its Trust clients as compensation for losses suffered after Merchants invested Trust monies in the Institutional Government Income Portfolio ("the Fund"). Merchants has represented to this Court that it intends to keep the Merchants Net Share to recoup a portion of this $9.2 million payment. Two trust clients have appeared before this Court challenging Merchants' right to keep the Merchants Net Share and contending that the proceeds belong to the Trust clients. Counsel for these clients also claims a right to a portion of the attorneys fees ordered. Merchants denies that the Trust clients are entitled to the settlement proceeds, and Lead Class Counsel denies that the Savoies' counsel is entitled to attorneys fees.

Because of the unique nature of the dispute surrounding the entitlement to the Merchants Account Share, this Court, by order dated January 11, 1996, severed certain issues relating to this controversy ("the Merchants Controversy") from the remainder of the settlement. In the same order, the Court resolved all issues relating to the remainder of the settlement and entered final judgement as to that aspect of the litigation.

In the Preliminary Order dated June 24, 1996, the Court indicated that it shall enter an Order for Final Judgment on the issues underlying the Merchants Controversy no earlier than thirty

(30) days after the date of the mailing of this notice. The Proposed Order for Final Judgment contains the following findings and conclusions of law that may affect your rights:

1. Merchants, acting in its capacity as trustee, invested funds from one or more trusts ("the Trust." which term encompasses the plural) in the Fund. The persons with an interest in the trust accounts that purchased shares of the Fund are hereinafter referred to as " trust clients."

2. The Trust, acting through Merchants as trustee, is the Settlement Class Member and Settling Class Member associated with Combined Account #00000061619 (the "Merchants Account").

3. The Trust clients are not Settlement Class Members. The Trust clients have never had, and do not have, any claims against the Piper Defendants separate and apart from those belonging to the Trust. The Savoies Motion to intervene therefore is denied.

4. Merchants received notice of the Settlement and agreed to its terms on behalf of the Trust. Said notice may not have constituted adequate notice to the Trust, the Settlement Class Member associated with the Merchants Account; however, in response to an objection made by two of the Trust clients, notice of the Court's intention to enter this Order was provided to the Trust clients along with the Class Notice. All Trust clients were provided with an opportunity to be heard on any matter relating to the Merchants Controversy or the Class Action Litigation.

The Proposed Order for Final Judgment also orders the following:

1. All objections to notice relating to the Merchants Account are DENIED. The terms of the Court's January 11, 1996 Order for Final Judgment apply fully to the Merchants Account. Accordingly, without limiting the foregoing, those provisions that permanently barred all settled claims apply to all persons potential-

ly interested in the Merchants Controversy so as to bar permanently all settled claims arising out of the Trust's purchase of shares in the Fund;

2. The Court does not have subject matter jurisdiction over the Merchants controversy, or, in the alternative, declines to exercise supplemental jurisdiction over the Merchants Controversy. Nothing herein shall be construed to affect the outcome of that dispute;

3. Attorneys' fees payable out of the Merchants Account Share are awarded to Lead Class Counsel on the same terms and conditions as apply to all other accounts. The request of the Savoies' attorney, Dennis Johnson, for a share of said attorneys fees is DENIED. The Court's denial of Mr. Johnson's request for fees in this litigation is without prejudice to any claim he has asserted or may assert elsewhere for a share of the net settlement proceeds payable to the Trust based on his efforts on behalf of the Trust clients;

4. Merchants has submitted a Claim and Release Form affirmatively releasing all claims against the Piper Defendants. Notwithstanding Merchants' designation of itself as payee, the Escrow Agent shall process Merchants' Claim and Release Form as follows: the Effective date of this Order ("the Merchants' Effective Date") shall be 31 days after the date of this Order, unless this Order is appealed. If there is an appeal, the Merchants Effective Date shall be the date following the expiration of all appeals and periods for commencing further appeals. The Escrow Agent shall not distribute that portion of the Merchants Account Share payable to the Trust, after deducting the portion payable for attorneys' fees, until 30 days after the Merchants Effective Date. At the conclusion of that period, the Escrow Agent shall make the initial settlement cash payment and all future distributions payable to the Trust, in care of the court which has given leave to any or all Trust clients to deposit some or all of the Merchants Account Share with that court, pursuant to Vermont Rule of Civil Procedure. If no such leave has been granted by that time, the Escrow Agent shall make payment to Merchants, as trustee for the Trust; and

5. The Court hereby retains and reserves jurisdiction over (I) implementation of the Settlement Agreement and the distribution of settlement proceeds to another court or Merchants, on behalf of the Trust; (ii) the Settlement Fund and the Escrow Agent; (iii) the Merchants Controversy until the Effective Date contemplated in Paragraph 6 of this Order; and (iv) all parties to the Settlement Agreement and all Settling Class Members for the purpose of enforcing and administering the Settlement Agreement and this Settlement.

THE COURT'S PROVISION OF NOTICE AND YOUR OPPORTUNITY TO COMMENT

Once the Court enters the above-described Order for Final Judgment, you will be forever barred from challenging any of the Court's Orders relating to the Settlement Agreement. Without limitation, you also will be forever barred from bringing any claim against the Piper Defendants relating to the Trust's investment in the Fund, as provided in the Court's various orders regarding the Settlement Agreement. The Order for Final Judgment will not bar you from pursuing separate rights or remedies you may have against Merchants, if any. For this reason , and as a precautionary measure, this Court is providing you with this notice and opportunity to comment or request a hearing on the preliminary conclusions set forth in the Court's Proposed Order for Final Judgment or any other matter relating to this litigation before the Court's actual entry of the proposed final order.

Any comments you may have or any request for a hearing must be submitted in writing and received by this Court no later than August 8, 1996, which is thirty (30) days from the mailing of this notice. This Court, in its discretion, may choose to respond to your comments and requests by written letter or order, or by granting a hearing. This Court retains the discretion to decide whether your request for a hearing and related comments warrant such a proceeding. THIS COURT IS NOT OBLIGATED TO RENDER ANY RESPONSE TO YOUR COMMENTS OR REQUEST FOR A HEARING. Your written comments an requests may be considered public and may be viewed by the various parties involved in the settlement.

After August 8, 1996, the Court will no longer accept or consider comments or hearing requests. Absent this Court's decision to enter a modifying or delaying order in the interim, the Court will enter the Order for Final Judgment described herein.

THE COURT'S PROVISION OF THIS NOTICE DOES NOT ESTABLISH THAT YOU HAVE ANY VALID CLAIMS AGAINST THE DEFENDANT RELEASEES, THAT YOU ARE A CLASS MEMBER, THAT YOU HAVE STANDING TO CHALLENGE THE FAIRNESS OF THE SETTLEMENT AGREEMENT, OR THAT YOU ARE ENTITLED TO ANY PORTION OF THE MERCHANTS ACCOUNT SHARE. This Notice merely provides you with an opportunity to be heard by this Court prior to the entry of the proposed Order for Final Judgment.

If you wish to make a claim of entitlement to a portion of the Merchants Account Share, this Court's proposed Order for Final Judgment dictates that if you bring such a claim in an appropriate court and obtain the court's permission to deposit the settlement proceeds with it no more than thirty (30) days after the Merchants Effective Date, the settlement proceeds will be paid into that court rather than to Merchants as trustee. (The earliest that thirty (30) days after the Merchants Effective Date can expire is ninety-one (91) days after the mailing of this notice.) Nothing herein shall affect the statute of limitation defenses, if any, that may otherwise apply to such claims.

ENCLOSURE AND QUESTIONS

This notice package should contain a copy of the Notice of Class Action Determination and Hearing on Settlement of Class Action sent to all members of the Settlement Class. If this document is not contained within this package in its entirety, please contact Norman Williams of Gravel and Shea at 802-658-0220 for new or complete copies.

All questions concerning matters discussed in this notice must be submitted to this Court in writing.

PLEASE DO NOT ADDRESS QUESTIONS TO THE COURT OR THE CLERK OF THE COURT IN PERSON OR BY TELEPHONE.

The Court has the discretion to decide how and whether to respond to written questions. Additional publicly filed documents relating to the Litigation and Settlement Agreement can be ordered from the Clerk of the Court at your expense.

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: Piper Funds Inc. Institutional Government Income Portfolio Litigation

Master File No. 3-94-587

ORDER FOR FINAL JUDGMENT

This document relates to:

All Actions

INTRODUCTION

Originally, this matter was before the Court upon Leon and Marion Savoie's Objection, in part, to Final Approval of Settlement and Motion for Attorneys' Fees in the above-captioned matter. Leon and Marion Savoie ("the Savoies") objected to the final approval of the Settlement Agreement in this matter to the extent that it would have distributed certain monies to The Merchants Trust Company and its affiliates, including Merfarm & Co., Inc., The Merchants Bank, and The Merchants Bancshares (collectively, "Merchants"). The Savoies also objected to Lead Class Counsel's motion for attorneys' fees to the extent that it requested an award of fees relating to the portion of the Settlement Fund allocated to Merchants.

In an order dated December 14, 1995, the Court denied the Savoies' objections. The Savoies filed an expedited motion for reconsideration of that order and a motion to stay execution of final

judgment on December 30, 1995. Shortly thereafter, the Piper Defendants filed a motion to vacate this Court's December 14, 1995, Order for Final Judgment and the order denying the Savoies' objections, which Plaintiffs joined in part. In response to these motions and after reviewing the parties' submissions, the Court vacated its December 14, 1995, Order for Final Judgment and entered a new Order for Final Judgment on January 11, 1996. The new order severed the dispute between the Savoies and Merchants ("the Merchants Controversy") from the rest of the settlement, entered final judgment on all other settlement issues, and directed that the Merchants Account Share not be distributed pending further order of the Court. In a second January 11, 1996, order, the Court vacated the December 14, 1995, Order denying the Objection of Leon and Marion Savoie and modified the December 14, 1995, Order denying the Savoies' motion for attorneys' fees. The second order directed that the pro rata share of attorneys' fees attributable to the Merchants Account Share not be distributed until further order of the Court and ordered that the Savoies and Merchants submit to the Court memoranda addressing whether the Court has jurisdiction to resolve the dispute between them and whether venue here is proper. The Court entered a Preliminary Order on June 24, 1996, affording Merchants' Trust clients thirty days to be heard on any issue relating to the Merchants Controversy or the underlying litigation. The Court now addresses the issues raised by the Savoies' and Merchants' memoranda, as well as memoranda submitted by Plaintiffs and the Piper Defendants. In addition, the Court considers the objections to the proposed order for Final Judgment filed by Trust Clients Leon J. Savoie, Herman H. Holmes, Lucille F. Holmes, Earl Hovey, Ronald G. Ferris, Donna L. Ferris and Stanley A. Morgan (the "Objectors').

In addition, the Savoies have submitted a motion to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure on behalf of themselves and all other purchasers of shares in the Institutional Government Income Portfolio purchased through Merchants during the class period, and Merchants has filed a conditional motion to intervene. The Court considers these motions as well.

BACKGROUND

Merchants manages several types of trust accounts for its clients, including discretionary trust accounts and "Wealthbuilder" trust accounts. Clients open Wealthbuilder accounts as an alternative to certificates of deposit or savings accounts. The client can select from five investment categories, including a taxable fixed income fund, and can transfer or remove their money at any time. Merchants has complete discretion to decide which mutual funds comprise each investment category.

In October 1993, on the advice of Piper Capital Management Company, Merchants invested funds from both discretionary trust accounts and certain Wealthbuilder trust accounts (collectively, "the Trust") in the Piper Funds Inc. Institutional Government Income Portfolio (the "Fund"). Those funds had been invested previously in Federated GNMA shares. Merchants selected the Fund as the investment for the taxable fixed income investment category.

On June 9, 1993, the Savoies[1] opened a Wealthbuilder account at Merchants and chose the taxable fixed income category. In October, the funds in the Savoies' account were shifted from an investment in Federated GNMA shares to an investment in the Fund. Due to the well-documented problems with the Fund, the Savoies lost over $17,000. As a result of this loss, the Savoies filed a class action lawsuit against Merchants in federal district court in Vermont on October 25, 1994, alleging violations of federal securities laws, negligent misrepresentation, breach of contract, and breach of fiduciary duty. The class that the Savoies putatively represent has never been certified, and the lawsuit remains on appeal to the Second Circuit.[2]

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[1]Marion Savoie has recently passed away. Leon Savoie continues in his litigation on behalf of himself, the Wealthbuilder Account of Leon J. And Marion Savoie, and all other persons and entities that purchased shares in the Fund through Merchants.

[2]On Appeal, Merchants is contesting a preliminary injunction that required it to place $500,000 in an escrow account for possible payment of the Savoies' attorney fees. Apparently, the only issues remaining in the case in Vermont are whether the federal district court there had subject matter jurisdiction to issue the preliminary injunction and whether the Savoies' attorney are entitled to fees arising from a pay-out to Merchants' clients.

Merchants decided to liquidate all investments in the Fund and reimburse its clients for their losses, as measured by the difference between the Fund's performance and the performance of the Federated GNMA shares. On December 28, 1994, Merchants paid its clients approximately $9.2 million; the Savoies received $17,318.70. Merchants did not ask for or obtain releases or assignments from its clients in return for the pay-out, but it believes that it has fully reimbursed its clients. In 1995, Merchants accepted the settlement in this action and has announced that it plans to keep the settlement proceeds to reimburse itself partially for the $9.2 million pay-out instead of distributing some or all of the proceeds to its Trust clients.

DISCUSSION

I. JURISDICTION

A. This Court Has Jurisdiction to Determination Who Is the Proper Class Member Associated with the Merchants Account Share and Thus Whether the Savoies Have Standing to Object to the Settlement Agreement.

Only those persons or entities who are parties to a settlement proceeding have standing to object to those proceedings. See, e.g., In re Viatron Computer Sys. Corp. Litig., 614 F.2d 11, 14 (1st Cir.), cert. denied sub nom. Arthur Andersen & Co. v. Stewart, 449 U.S. 826 (1980); In re Equity Funding Corp. Of Am. Sec. Litig., 603 F.2d 1353, 1360-61 (9th Cir. 1979). Therefore, one who is not a settlement class member or a settling defendant may not object to a proposed settlement. See Fed. R. Civ. P. 23(e); Gould v. Alleco, Inc., 883 F.2d 281, 284 (4th Cir. 1989) (holding that nonclass members have no standing to object to settlement), cert. denied, 493 U.S. 1058 (1990). To determine whether the Savoies have standing to object to the distribution of the Merchants Account Share to Merchants as directed by the Settlement Agreement, the Court must determine whether the Savoies are settlement class members.

Clearly, this Court has federal question jurisdiction over the class action securities litigation brought against the Piper Defendants. 28 U.S.A. §1331. It is also undisputed that because Federal Rule of Civil Procedure 23 directs the Court to adjudicate all aspects of a class action litigation before it, the Court has jurisdiction to determine which parties are members of the settlement class. Thus, the Court has jurisdiction to determine whether the Savoies are members of the settlement class with standing to object to the Settlement Agreement.

B. The Savoies Are Not Proper Settlement Class Members.

Because a class action is a procedural device that combines the claims of similarly situated people or entities into one lawsuit, each member of the class must have an independent cause of action against the defendant to be properly included in the class. See State Sec. Ins. Co. V. Frank B. Hall & Co., 95 F.R.D. 496, 498 (N.D. Ill. 1982) (citing Zahn v. International Paper Co., 414 U.S. 291, 301 (1973), which held that each plaintiff in a class action lawsuit must satisfy jurisdictional amount in diversity case and that "one plaintiff may not ride in on another's coattails"); cf. Darrow v. Southdown, Inc., 574 F.2d 1333, 1336-37 (5th Cir.) (holding that because would-be objector could not have brought derivative action as shareholder on his own behalf, he could not object to settlement), cert. denied sub nom. D. Doyle Mize & Addis Corp. V. Darrow, 439 U.S. 984 (1978); Aks v. Bennett, 150 F.R.D. 187, 192 (D. Kan. 1993) (stating that ERISA trust beneficiaries who could not bring claims directly against third party could not be part of class action lawsuit against that third party). In other words, if the Savoies, and Merchants' other clients, could not have brought an action against the Piper Defendants on their own behalf, they cannot be included in the class.

Because of the trust relationship that exists between the Savoies and Merchants, the Savoies do not have any independent claims against the Piper Defendants and thus cannot be considered settlement class members. When parties enter into a commercial trust relationship such as the one between the Savoies and

Merchants, only the trustee, not the trust beneficiary, may bring suit against a third party for injury to the trust. See Restatement (Second) of Trusts §280-282 (1957); see also In re New England Mut. Life Ins. Co. Litig., 841 F. Supp. 345, 348 (W.D. Wash. 1994), aff'd, 54 F.3d 786 (9th Cir. 1995); Aks, 150 F.R.D. at 191. The beneficiary cannot maintain an action at law against a third party unless the beneficiary is in possession of the trust property, see Restatement (Second) of Trusts §281 (1957), nor can the beneficiary maintain a suit in equity against a third party unless the trustee improperly refuses or neglects to bring suit or is not subject to the court's jurisdiction. See id. §282; see also New England Mutual, 841 F. Supp. at 348; Aks, 150 F.R.D. at 192.

While Merchants did not initiate the class action litigation against the Piper Defendants, it did join the class action and thus took "reasonable steps to realize on claims which [it] holds in trust," as required by the Restatement (Second) of Trusts section 177. The Savoies are not in possession of the Trust property. Merchants has not refused to bring suit against the Piper Defendants, and it is subject to this Court's jurisdiction. Furthermore, the Savoies have never alleged that Merchants colluded with the Piper Defendants in any way. Cf. New England Mutual, 841 F. Supp. At 348 ("At common law, if a trustee and a third party jointly participate in collusion in breach of trust, a beneficiary may have the right to sue the third party directly."). Thus, because the Savoies have no independent claims against the Piper Defendants and because the exceptions listed in sections 281 and 282 do not apply, the Savoies are not members of the settlement class. The settlement class member that relates to the Merchants Account Share is the Trust itself, acting through Merchants as the trustee. Cf. Nathan Gordon Trust v. Northgate Exploration, Ltd., 148 F.R.D. 105, 106-07 (S.D.N.Y. 1993) (certifying a class in securities litigation class action suit brought by a trust, which was purchaser of stock, through its trustee); Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704, 715 (D. Colo. 1996) (stating that the legal entity in a trust relationship is the trustee acting on behalf of the trust, not the beneficiary).

The Savoies do not have any independent claims against the Piper Defendants for a second reason: they are not proper plaintiffs in a securities action against the Piper Defendants, irrespective of the trust relationship between the Savoies and Merchants. Federal securities laws were enacted to protect buyers and sellers of securities and to ensure that buyers and sellers are provided with truthful information about the securities being bought or sold. See Congregation of the Passion v. Kidder Peabody & Co., 800 F.2d 177, 181 (7th Cir. 1986) ("[T]he relevant inquiry is whether plaintiffs were denied information that would or might have been useful to them in deciding whether to purchase or sell securities which they did actually purchase or sell.") (quoting O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54, 60 (7th Cir. 1979)); Birnbaum v. Newport Steel Corp, 193 V.2d 461, 464 (2d Cir.) (holding that §10(b) and Rule 10b-5 "extended protection only to the defrauded purchaser or seller"), cert. denied, 343 U.S. 956 (1952). In some contexts involving trust beneficiaries, courts have relaxed the requirement instituted by Birnbaum that plaintiffs in securities actions must have either bought or sold the securities themselves. See, e.g., Kirshner v. United States, 603 F.2d 234, 237 (2d Cir. 1978) (holding that beneficiary of a pension trust had standing to bring securities claim against trustees of fund), cert. denied, 442 U.S. 909 (1979); James v. Gerber Prods. Co., 483 F.2d 944, 948-49 (6th Cir. 1973) (allowing securities action by beneficiary against trustee and third party where trustee was allegedly party to the fraud and would not sue on beneficiary's behalf); Klamberg v. Roth, 425 F. Supp. 440, 442 (S.D.N.Y. 1976) (holding that beneficiary can bring securities claim against trustee, especially when transaction was not at arm's length); Heyman v. Heyman, 356 F. Supp. 958, 966 & n.9 (S.D.N.Y. 1973) (permitting beneficiary to bring claim against trustee and purchaser because stock sale was not an arm's-length transaction). But see Santa Fe Indus., Inc. V. Green, 430 U.S. 462, 477-80 (1977) (finding no cause of action under §10(b) and Rule 10b-5 for breach of fiduciary duty in selling stock); Pross v. Katz, 784 F.2d 455 (2d Cir. 1986) (holding that a breach of fiduciary duty does not violate §10(b)). In instances where an individual gives complete investment discretion to another party such as an investment advisor, however, the individual cannot bring federal securities claims against third parties

who conduct business with that advisor at arm's length. See, e.g., Congregation of the Passion, 800 F.2d at 181 (holding that plaintiff could not bring securities claims against third-party dealers because plaintiff made no investment decisions); Sheldon Co. Profit Sharing Plan & Trust v. Smith, 828 F. Supp. 1262, 1270 (W.D. Mich. 1993) (same); cf. Lewis v. Walston & Co., 487 F.2d 617, 622 (5th Cir. 1973) (individuals who purchased stock through a relative did not have right to sue third party; only relative could sue).

The Savoies could not have brought this securities action on their own against the Piper Defendants because they, like the plaintiffs in Congregation of the Passion and Sheldon, gave complete discretion investment to their investment advisor, Merchants, when they opened a Wealthbuilder account and selected the taxable fixed income fund as their investment category. While the Savoies could have switched investment categories, withdrawn funds from their account, or closed the account, Merchants had complete discretion to decide whether to buy or sell shares of a particular mutual fund with the Savoies' money. See Congregation of the Passion, 800 F.2d at 181 (finding that plaintiff retained authority to vary amount of the investment fund and to dismiss advisor but that that authority related to relationship with advisor and not to any particular decision to buy or sell a security). The Savoies made no investment decisions; Merchants held title, reviewed all investment materials, and voted all shares. Thus, the Savoies could not have brought a securities action against the Piper Defendant because they made no decisions that would have been affected by any misleading information provided by the Piper Defendants. See id. Furthermore, there has been no suggestion that the dealings between Merchants and the Piper Defendants have been anything but arm's length transactions. This fact distinguishes the instant case from several cases cited by the Savoies, which support an independent cause of action by trust beneficiaries if the trustee and third parties act in concert. See James v. Gerber Products Co., 483 F.2d 944 (6th Cir. 1973); Heyman v. Heyman, 356 F. Supp. 958 (S.D.N.Y. 1973). The Savoies are not members of the settlement class and are not entitled to receive a pro rata portion of the Merchants Account Share directly.

The Objectors argue that by holding that the Trust clients are not class members, the Court has ignored the definition of the Settlement Class contained in the Settlement Agreement. The Settlement Class is defined as "a class of all persons who purchased shares of the Fund . . . during the relevant class period, and all other original or subsequent holders of any interest in any of said shares (including but not limited to donees, assignees, devisees, beneficiaries, and other transferees)." (Settlement Agreement at 37, ¶ AP.) The Trust is the entity that actually purchased shares of the Fund, and the Trust may participate in the settlement only through its trustee. If the Trust clients are also considered members of the Settlement Class, those clients would be entitled to double recover from the Piper Defendants. Such a result could not have been the intention of the Settlement Agreement's participants.

The Court's determination that the Savoies, and Merchants' other Trust clients, are not class members does not prejudice their claim to the settlement proceeds. Presumptively, whatever money is recovered by Merchants pursuant to the Settlement Agreement is held subject to the Trust since Merchants may participate in the settlement only as a trustee. See Restatement (Second) of Trusts §280 cmt. h (1957). As trust beneficiaries, the Savoies have rights that can be asserted under state law if they believe that Merchants has acted improperly in its role as trustee and that they are entitled to some or all of the settlement proceeds.[3]

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[3] Merchants has announced its intention to keep the settlement proceeds for itsef as reimbursement for the pay-out it made to its clients in November 1994. This action by Merchants suggests that the Savoies will have to file a claim against Merchants to recover any portion of the Merchants Account Share and, as discussed in Part II, below, exposes the Piper Defendants to liability for any payment to Merchants. Merchants' announced intentions do not call into question the Court's finding that Merchants did not improperly refuse or neglect to bring suit because Merchants did join the settlement class as trustee for the Trust and makes a credible argument that its clients have been sufficiently reimbursed for their losses.

C. This Court Does Not Have Jurisdiction to Resolve the Dispute Between the Savoies and Merchants Over the Settlement Proceeds Payable in Connection with the Merchants Account Share.

As discussed above, this Court has federal question jurisdiction over the class action litigation that underlies the Merchants Controversy because that class action alleged violations of federal securities laws against the Piper Defendants. In contrast, the Savoies' claim of entitlement to a potion of the settlement proceeds arises under state law of trusts and breach of fiduciary duty, not under federal law. Consequently, the Court can exercise jurisdiction over the Merchants Controversy only if the dispute falls within the reach of the federal supplement jurisdiction statute, 28 U.S.C. §1367. Section 1367 provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ." 28 U.S.C. §1637(a); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (holding that a federal district court may exercise supplemental jurisdiction over a state claim only if the state claim and the underlying federal claim "derive from a common nucleus of operative fact").

The issues involved in the Savoies' claims against Merchants are not so related to the claims in the underlying securities litigation as to form part of the same case or controversy. The Merchants Controversy does not affect the rights or obligations of the Piper Defendants, the Named Plaintiffs, or lead Class Counsel. It does not alter the amount of money being paid out by the Piper Defendants; rather, it determines who will receive a small portion of those funds. It raises novel issues of Vermont state trust law that are entirely different from those involved in the original federal securities litigation and the determination of the settlement's fairness. Moreover, while the Merchants Controversy involves a dispute over a payment from a settlement fund created by the core litigation, the dispute does not derive from a common nucleus of

facts. The Merchants Controversy involves allegedly inappropriate conduct by Merchants in investing its clients' funds, whereas the underlying litigation involves allegedly illegal conduct by the Piper Defendants in providing information to investors. The Court does not have supplemental subject matter jurisdiction over the Merchants Controversy pursuant to 28 U.S.C. §1367(a).

Even if the Court did have supplemental jurisdiction over the Merchants Controversy, however, it would decline to exercise that jurisdiction pursuant to 28 U.S.C. §1367(c). Section 1367(c) enables a court to decline jurisdiction if the claim raises a novel or complex issue of state law, the district court has dismissed all claims over which it has original jurisdiction, or, in extraordinary circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. §13679(c)(1), (3), (4). The Merchants Controversy raises a novel issue of Vermont state trust law, and the Court has dismissed or entered judgment on all claims over which it has original jurisdiction. Furthermore, the parties to the Merchants Controversy are located in Vermont, as are most witnesses and documents. This dispute should be heard in Vermont sate court or as a pendant claim to the litigation between these two parties that is currently pending in federal court in the District of Vermont.

The Savoies also argue that this Court expressly retained jurisdiction over the substantive elements of the Merchants Controversy in its January 11, 1996, Orders and that by vacating its December 14, 1995, Order denying the Savoies' objections to the settlement, the Court determined that the Savoies are members of the settlement class. The Savoies state: "On January 11, 1996, this Court vacated its December 14, 1995 Order, which had found that the Savoies had no standing in this action. Thus, the clear import of the Court's reversal is that the Savoies . . . are proper members of the settlement class in this case." (Mem. Supp. Savoies' Mot. for Intervention at 2 (emphasis in original).) The Savoies also write that "[w]hile the Court has not explicitly expressed its findings of standing, we believe it clear that the Court has moved past this issue and now seeks to resolve the substantive issues raised by the Savoies [sic] Objection." (Savoies' Mem. regarding Ct.'s Jurisdiction at 37.)

The Court does not appreciate the Savoies' mischaracterization of its actions. The Court never reversed its December 14, 1995, Orders or decided that the Savoies were settlement class members; no reasonable reading of the January 11, 1996, Orders could produce such an interpretation.[4] Rather, the Court vacated portions of the December 14, 1995, Orders so as to consider more fully the propriety of its decision as to the Savoies' standing to object to the settlement. As indicated in the January 11, 1996, Order for final Judgment and Order vacating the denial of the Savoies' objections, the Court sought additional submissions from the parties to assist it in determining whether the substantive dispute between the Savoies and Merchants was properly before it. The Court never specifically retained jurisdiction over the substantive dispute; it retained jurisdiction so that it could decide whether to retain jurisdiction over the substantive dispute. In any event, the issue of whether the Court has properly asserted supplemental jurisdiction over a state claim remains open throughout the litigation, enabling the Court to reassess the propriety of jurisdiction at any time during the proceedings. See United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966). As the above analysis demonstrates, the Court has now determined that it does not have such jurisdiction.

D. Savoies' Motion for Intervention as of Right Does Not Provide Adequate Jurisdictional Grounds.

The Savoies have also filed a motion for intervention as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. They argue that the Court will have ancillary jurisdiction over their claims if it grants their motion. Rule 24(a) provides for intervention as of right when an applicant claims an interest relating to the property or transaction that is the subject of the

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[4]The Court found that "[b]efore the Court can resolve the substantive issues involved in the dispute between the Savoies and Merchants, it must determine whether the dispute is properly before it." Order Vacating Denial at 2. The court also concluded that "the unique facts and issues surrounding the Merchants Controversy justify, separate examination by this or possibly some other Court." Order for Final Judgement at 3.

action and when the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. See Fed. R. Civ. P. 24(a) (2); see also Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir. 1992). The Court agrees that the Savoies' interests are not adequately represented by existing parties; however, the Savoies' ability to protect any interest they may have in the Merchants Account Share will not be impeded by the Court's intended disposition of the Merchants Controversy. Because the Court has decided that it does not have subject matter jurisdiction over the Merchants Controversy and that the dispute between the Savoies and Merchants must be resolved in some other court, this Court will not prejudice the Savoies in any way by not granting their motion to intervene here. Therefore, the Savoies' motion for intervention as of right is denied.[5]

II. SUFFICIENCY OF NOTICE AND OF CLAIM AND RELEASE FORM

A. The Trust Has Received Adequate Notice.

The Piper Defendants raised the issue of whether notice to Merchants of the Settlement Agreement constituted adequate notice to the Trust. Because the Court has jurisdiction over the settlement of the class action litigation, it clearly has jurisdiction to assess the adequacy of notice of the Settlement Agreement to settlement class members.

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[5] Because the Court does not grant the Savoies' Motion to intervene, will not retain jurisdiction over the Merchants Controversy, and will not order any portion of the Merchants Account Share transferres to a second court absent leave of that court, Merchants' Conditional Motion to Intervene is denied as moot.

Ordinarily, Merchants as trustee would have been authorized to accept the settlement on behalf of the Trust. See restatement (Second) of Trusts §192 (1957). Thus, the Court would not have been required to provide notice to any person or entity besides Merchants; notice to Merchants would have constituted adequate notice to the Trust.[6] Here, however, Merchants has indicated that it plans to keep the settlement proceeds for itself in partial compensation for its earlier pay-out. This intended action directly conflicts with the Trust's interest in recovering the settlement proceeds. While Merchants' actions may be entirely appropriate due to its earlier payments to its clients, an issue that is not before this Court, its announcement nevertheless calls into question its authority to act on behalf of the Trust. It also places the Piper Defendants at risk for liability for any payments made to Merchants pursuant to the Settlement Agreement. See Restatement (Second) of Trusts §321 (1957) (stating that third parties are liable for participation in a breach of trust by a trustee if they made payment to the trustee with knowledge that the trustee intended to misapply the money).

As a precautionary measure to ensure that the Trust received adequate notice and that Merchants has bound the Trust to the settlement of this case, the Court provided to all Merchants' Trust clients notice of the Court's proposed holdings that Merchants had authority to settle all claims and that all claims against the Piper Defendants arising out of the Trust's investment in the Fund are barred and released by virtue of the settlement. The notice enclosed a copy of the Notice of Class Action Determination and Hearing on Settlement of Class Action that was sent to all members of the settlement class and provided Merchants' clients with an opportunity to be heard on concerns relating to this lawsuit or the Merchants Controversy. It also informed Merchants' clients of their right to commence a separate action in a more appropriate forum to determine who is entitled to the Trust's settlement proceeds.

Merchants was responsible for mailing this notice to its Trust clients. Merchants certified to the Court that it served the notice as directed and submitted the names and addresses of its

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[6] The individual trust clients would not have been entitled to separate notice because they are not members of the settlement class.

clients to the Court under seal. The names and addresses shall not be released without notice and an opportunity to be heard.

B. Merchants' Claim and Release Form is Invalid to the Extent It Designates Merchants as Payee.

In order to receive payment under the Settlement Agreement, class members must submit a Claim and Release Form identifying the person to be paid and affirmatively releasing the claims encompassed by the Settlement Agreement. The claim and release process does not affect the finality of the Settlement Agreement. Because the claim and release process is integral to the administration of the Settlement Agreement, the Court has jurisdiction to determine whether a would-be claimant has submitted a valid Claim and Release Form.

Under the Settlement Agreement, trustees submitting Claim and Release Forms must expressly represent that they are authorized to release all claims on behalf of the trusts. Ordinarily, payment is then made to the trustee based on the presumption that the trustee will perform its duties and pass along the settlement proceeds to the trust for the benefit of the beneficiaries. Because Merchants has announced that it intends to keep the settlement proceeds for itself, however, the validity of its Claim and Release Form as to the designation of Merchants as payee is questionable. To the Court's knowledge, none of Merchants' clients have approved its plans to keep the settlement proceeds, nor has any court determined that Merchants may keep the money for itself.

Without authorization form the Trust or a court, Merchants cannot keep the Trust's settlement proceeds for itself and cannot submit a Claim and Release Form designating itself as payee. In addition, the Piper Defendants face liability from the Trust if they give Trust property to Merchants knowing that Merchants intends to keep that property for itself. See Restatement (Second) of Trusts §321 (1957). The notice procedure outlined above gave Merchants' clients an opportunity to challenge Merchants' claim to the settlement proceeds. Several Trust clients, on behalf of them-

selves and all others similarly situated, have objected to Merchants' intention to release the Trust's claims against the Piper Defendants. Only if Merchants' clients have an opportunity to be heard and an appropriate court rules that their rights to the settlement proceeds have been extinguished by Merchants' $9.2 million pay-out can Merchants submit a valid Claim and Release Form that designates itself as payee.

C. The Merchants Account Share Shall Remain in Escrow Pending Transfer of Funds to a Vermont Court at the Request of a Party.

As the Court determined in Section I above, under ordinary circumstances Merchants would be authorized to receive the Merchants Account Share on behalf of the Trust, which is the settlement class member here. But because of the questions raised as to the propriety of Merchants' intentions to retain the Merchants Account Share for itself instead of distributing it to the Trust, and because Merchants' Claim and Release Form is currently invalid, the Merchants Account Share cannot be released to Merchants at this time. While this Court does not have subject matter jurisdiction over the Merchants Controversy, it can protect the interests of the Savoies and Merchants' other Trust clients by ordering that the Merchants Account Share be held for sixty days. Trust clients may, within the sixty-day period, file a claim in the appropriate Vermont court or a pendant claim in the appropriate federal court and obtain permission from that court allowing them to deposit the settlement proceeds with the court pursuant to Rule 67 of the Vermont Rules of Civil Procedure or Rule 67 of the Federal Rules of Civil Procedure.[7] If this Court is not directed to deposit the Merchants Account Share with another court within sixty days, it shall order the Escrow Agent to pay the money directly to Merchants, as trustee for the Trust, as set forth infra at Paragraph 6 of this Order

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[7]Vermont's Rule 67 provides that "[i]n an action in which any part of the relief sought is a judgement for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party. . . may upon notice to every other party, and by leave of court, deposit with the court all or part of such sum or thing, whether or not that party claims all or any part of the sum or thing." Vt. R. Civ. R. 67 of the Federal Rules of Civil Procedure is substantially the same.

and as was reprinted in the notice to all Trust clients. This procedure allows the Court to protect the interests of the Savoies and the other Trust clients even though it lacks jurisdiction to resolve the Merchants Controversy on the merits.

The Court rejects the Objectors' contentions that their interests are not adequately protected by this procedure. Until further order by an appropriate court, the settlement proceeds belong to the Trust. If Merchants takes possession of the settlement proceeds before an appropriate court has decided the dispute over entitlement to those funds, Merchants will take possession as a trustee, subject to all duties imposed on trustees as fiduciaries. See, e.g. Restatement (Second) of Trusts §179 (1957) ("The trustee is under a duty to the beneficiary to keep the trust property separate from his individual property, and, so far as it is reasonable that he should do so, to keep it separate from other property not subject to the trust, and to see that the property is designated as property of the trust."). The fact that the Merchants earlier submitted a claim to collect the settlement proceeds for itself—a claim explicitly rejected by this Court—does not in any way suggest that Merchants will now deliberately disobey this Order.

III. ATTORNEYS' FEES

In addition to objecting to the planned distribution of the Merchants Account Share directly to Merchants, the Savoies also object to the proposed distribution to Lead Class Counsel of the attorneys' fees attributable to the Merchants Account Share. The Savoies argue that their counsel, Dennis Johnson, is entitled to a portion of those fees for his efforts on their behalf and on the behalf of the other Trust clients. Lead Class Counsel disagree with the Savoies' position. The Court, of course, has jurisdiction to determine whether the portion of the settlement proceeds attributable to attorneys' fees for Lead Class Counsel is fair and reasonable. See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939). Necessarily, it also has jurisdiction to decide whether a particular portion of the attorneys' fees in a class action litigation should be awarded to an objector's attorneys.

Mr. Johnson argues that he is entitled to fees from the Settlement Fund established in this case because of the benefit conferred upon the class by the Savoies' objections to the Settlement Agreement. This argument is premised on the assumption that Merchants' Trust clients are members of the settlement class, an assumption that the Court has determined in Part I of this Order to be incorrect. Mr. Johnson may eventually confer a benefit on his clients and on other of Merchants' clients. He has not, however, conferred a benefit on any member of the settlement class in this case and is not entitled to attorneys' fees on that basis.

Mr. Johnson also argues that he should be awarded attorneys' fees because he brought to the Court's attention a dispute—the Merchants Controversy—that can later be resolved by another court and thus provided the Court with comfort that the settlement was fair. As both Lead Counsel and the Piper Defendants point out in their submissions, Mr. Johnson has never represented a party to this litigation. He was not involved in any of the litigation or negotiation that led to the drafting and signing of the Settlement Agreement or the creation of the Settlement Fund. Mr. Johnson's efforts in this matter may affect who ultimately receives the Merchants Account Share, but the amount of money contained in the Settlement Fund will not be altered by the resolution of the Merchants Controversy, nor will the amount of the Merchants Account Share change in any way. The fact that a separate dispute exists over who is entitled to the Trust's settlement proceeds does not diminish Lead Class Counsel's role in securing the settlement in the first place.

The cases on which Mr. Johnson relies to support his argument are not on point and in fact support the opposite result. For example, the court in Howes v. Atkins stated that "[u]susally, if [objectors'] efforts did not improve the terms of the settlement, they do not receive a fee." 668 F. Supp. 1021, 1027 (E.D. Ky. 1987). The Howes court made an exception in the case before it because the objectors' counsel substantially supplemented the attack on the settlement made by plaintiffs' counsel; although the terms of settlement remained the same, the court was "much more comfortable" with the substance of the settlement due to the efforts of objectors' counsel. Id. Here, Mr. Johnson's arguments did not

affect or even pertain to the substance of the Settlement Agreement. In fact, Mr. Johnson did not make his first appearance before this Court until the July 31, 1995, hearing on preliminary approval for the settlement. His submissions do not fall into the exception carried out in Howes.

Several other cases cited by Mr. Johnson are equally inapposite. In In re Domestic Air Transportation Antitrust Litigation, the court wrote:

> If objectors' appearance sharpens the issues and debate on the fairness of the settlement, their performance of the role of devil's advocate warrants a fee award. Objectors deserving of compensation may cause the Court to spend even more hours in analyzing and assessing the complex agreement, and cast in sharp focus the question of the fair ness and adequacy of the settlement to all members of the class.

148 F.R.D. 297, 358 (N.D. Ga. 1993). Mr. Johnson's contribution does not match that described in the above quotation. The Court did not alter its view of the fairness or adequacy of the Settlement Agreement in any way based on Mr. Johnson's argument, largely because Mr. Johnson never questioned the fairness or adequacy of the Settlement Agreement. He questioned only Merchants' entitlement to the Merchants Account Share. If Mr. Johnson is to receive attorneys' fees, it must be in connection with the Merchants Controversy itself. The federal district court in Vermont has already escrowed $500,000 for that very purpose pending the resolution of the federal litigation currently before the Second Circuit.

Mr. Johnson also cites to Kiser v. Miller, for the proposition that attorneys' fees for an objector are appropriate to prevent fiduciary abuse by a trustee. 364 F. Supp. 1311, 1320 (D.D.C. 1973), aff'd in part, rev'd in part sub nom. Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974). In that case, however, the trustee charged with fiduciary abuse was the defendant to the case, not merely a potential recipient of settlement proceeds. Id. Mr. Johnson's arguments on this point are disingenuous at best.

Finally, Mr. Johnson argues that he should receive a portion of the attorneys' fees in this case pursuant to the common fund doctrine to the extent that Merchants' efforts to obtain reimbursement from the Piper Defendants for Merchants' pay-out to its clients directly caused the Piper Defendants to come to the settlement table and dictated the parameters of the settlement fund. In the case that Mr. Johnson cites in support of this proposition, Koppel v. Wien, the Second Circuit remanded the case to the district court for a hearing to determine causation based on the plaintiff's "strong showing that the undisputed facts establish causation." 743 F.2d 129, 135 (2d Cir. 1984). Here, there is not a scintilla of evidence that Merchants' participation in the class action directly influenced the Piper Defendants' participation in the settlement process. The fact that Merchants, along with hundreds of other class members, opted into the Settlement agreement does not on its own constitute anything resembling a "strong showing" that causation exists. Mr. Johnson's argument is without merit; his request that the Court reallocate the award of fees is denied.

CONCLUSION

This Court, by virtue of its federal question jurisdiction over the securities litigation brought against the Piper Defendants, has jurisdiction to determine who is the proper settlement class member associated with the Merchants Account Share. The Court can make this determination without resolving the substantive dispute between the Savoies and Merchants that prompted the Savoies' objections to the Settlement Agreement. Because of the trust relationship that exists between the Savoies and Merchants, and because the Savoies are not proper plaintiffs in a securities action against the Piper Defendants, the Savoies and Merchants' other Trust clients are not settlement class members in this litigation. The settlement class member associated with the Merchants Account Share is the Trust itself. The court lacks supplemental jurisdiction over the Merchants Controversy because the dispute does not form part of the same case or controversy as the underlying class action litigation. Even if supplemental jurisdiction did exist, however, the Court would decline to exercise that jurisdiction. Finally, because the Savoies' attorney did not confer a benefit on the settlement class in this instance, the Savoies' request that the Court reallocate the award of fees is denied.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. All objections to notice relating to the Merchants Account are DENIED. The terms of the Court's January 11, 1996, Order for Final Judgment apply fully to the Merchants Account Share. Accordingly, without limiting the foregoing, those provisions that permanently barred all Settled Claims apply to all persons potentially interested in the Merchants Controversy so as to bar permanently all Settled Claims arising out of the Trust's purchase of shares in the Fund. Stated otherwise, without limiting the foregoing, all persons with an interest or claimed interest in shares of the Fund associated with the Merchants Account Share (including but not limited to Merchants and the Trust clients) are barred and enjoined from asserting or prosecuting claims based on or related to Settled Claims against (a) the Piper Releases and (b) other persons to the extent set forth in the Settlement Agreement;

2. The Court does not have subject matter jurisdiction over the Merchants Controversy or, in the alternative, declines to exercise supplemental jurisdiction over the Merchants Controversy. Nothing herein shall be construed to affect the outcome of that dispute;

3. The Savoies' Motion on Behalf of Themselves and All Other Purchasers of Piper Jaffray Shares Purchased Through Merchants to Intervene Pursuant to Rule 24(a)(2) (Clerk Doc. No. 236) is DENIED.

4. Merchants' Conditional Motion to Intervene (Clerk Doc. No. 243) is DENIED AS MOOT;

5. Attorneys' fees payable out of the Merchants Account Share are awarded to Lead Class Counsel on the same terms and conditions as apply to all other accounts. The request of the Savoies' attorney, Dennis Johnson, for a share of said attorneys' fees is DENIED. The Court's denial of Mr. Johnson's request for fees in this litigation is without prejudice to any claim he has asserted or may assert elsewhere for a share of the net settlement proceeds payable to the Trust based on his efforts on behalf of the Trust clients;

6. Merchants received notice of the Settlement Agreement and agreed to its terms on behalf of the Trust. Merchants has submitted a Claim and Release Form affirmatively and validly releasing all claims against the Piper Defendants. Notwithstanding Merchants' designation of itself as payee, the Escrow Agent shall process Merchants' Claim and Release Form as Follows: the Effective Date for this Order ("the Merchants' Effective Date") shall be 31 days after the date of this Order, unless this Order is appealed. If there is an appeal, the Merchants Effective Date shall be the date following the expiration of all appeals and periods for commencing further appeals. The Escrow Agent shall not distribute that portion of the Merchants Account Share payable to the Trust, after deducting the portion payable for attorneys' fees, until 30 days after the Merchants Effective Date. At the conclusion of that period, the Escrow Agent shall make the initial settlement cash payment and all future distributions payable to the Trust, in care of the court which has given leave to any or all Trust clients to deposit some or all of the Merchants Account Share with that court, pursuant to Vermont Rule of Civil Procedure 67, Federal Rule of Civil Procedure 67, or such other rule as may apply. If no such leave has been granted by that time, the Escrow Agent shall make payment to Merchants, as trustee for the Trust; and

7. The Court hereby retains and reserves jurisdiction over (i) implementation of the Settlement Agreement (including, but not limited to, the enforcement of the Order for Final Judgment as to all persons affected thereby) and the distribution of settlement proceeds to another court or Merchants, on behalf of the Trust; (ii) the Settlement Fund and the Escrow Agent; (iii) the Merchants Controversy until the Effective Date contemplated in Paragraph 6 of this Order; and (iv) all parties to the Settlement Agreement and all Settling Class Members for the purpose of enforcing and administering the Settlement Agreement and this Settlement.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 18, 1997

s/_____
Paul A. Magnuson
United States District Court Judge